No. (1)

In The
Supreme Court of the United States

UNITED RETIRED PILOTS BENEFIT PROTECTION ASSOCIATION, et al.,

Petitioners,

v.

UNITED AIR LINES, INC., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

If the collective-bargaining agreement that is in existence on the date a union employee retires provides to that employee the right to receive pension benefits for the rest of his or her life, those benefits become contractually vested on his or her retirement date. Under well-established law, after that employee retires, his or her former employer may not modify or terminate the retiree's contractually vested benefits without the actual consent of the retiree. The questions presented are:

(1) Is an employer who is reorganizing under Chapter 11 of the Bankruptcy Code obligated to satisfy the requirements of 11 U.S.C. § 1113 and negotiate in good faith with an authorized representative for retired employees who have contractually vested pension rights before the employer modifies or terminates the pension benefits?

(2) If a bankruptcy court approves an agreement between a Chapter 11 debtor and a union that only represents active employees, and the agreement modifies the pension benefits of the debtor's retired employees, including non-tax-qualified pension benefits that are not insured by the Pension Benefit Guaranty Corporation, even though the debtor failed to negotiate with an authorized representative for retired employees or comply with the other requirements of 11 U.S.C. § 1113 with respect to its retirees, should a reviewing court vacate the order approving the agreement and require the debtor to comply with 11 U.S.C. § 1113?

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, the United Retired Pilot Benefit Protection Association states that it has no parent companies or subsidiaries.

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, the following individuals were appellants in the Seventh Circuit Court of Appeals and are petitioners in this Court:

Roger D. Hall
Dennis D. Dillon
Gerard Terstiege
Eugene M. Cummings
Raymond P. Fink
James M. Krasno
William L. Rutherford

Although United Air Lines, Inc. was the primary defendant in the proceedings below, UAL Corporation, its parent company, and other related Chapter 11 debtors may have also been considered parties in the Chapter 11 proceedings from which the bankruptcy court orders under appeal arose.

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OPINIONS BELOW

The March 31, 2006 opinion of the United States Court of Appeals for the Seventh Circuit is reported at *United Retired Pilots Benefit Protection Association v. United Air Lines, Inc.*, 443 F.3d 565 (7th Cir. 2006) (App. at 1-13). The Seventh Circuit affirmed the June 22, 2005 decision of the United States District Court for the Northern District of Illinois, Eastern Division reported at 2005 WL 1528259 (N.D. Ill. 2005) (App. at 14-21). The district court opinion affirmed the December 14, 2004 and January 31, 2005 orders of the United States Bankruptcy Court for the Northern District of Illinois, Eastern Division. A copy of the bankruptcy court's December 14, 2004 order is attached (App. at 22-37) along with a copy of the transcript from the proceedings that led to the entry of the order (App. at 38). The bankruptcy court's January 31, 2005 order is also attached (App. at 39-41).

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Seventh Circuit's opinion was rendered on March 31, 2006.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

11 U.S.C. § 1113 is lengthy and, therefore, is set out in App. at 42-44 pursuant to Supreme Court Rule 14.1(f).

STATEMENT

A. Overview

This case involves a pilots union that explicitly refused to represent its own retired pilots and an employer, reorganizing under Chapter 11 of the Bankruptcy Code, that refused to allow a retiree representative into negotiations that

involved the retired pilots' pension benefits. During these negotiations, the union and employer signed an agreement regarding the termination of the retired pilots' pensions in exchange for substitute payments made solely to the union and active employees, again excluding the retired pilots who had the most to lose from a pension termination. The question here is whether that type of bargain should be sanctioned by the federal courts, a question upon which the Circuit Courts of Appeal are split.

There is no dispute regarding one point. Many of United Air Lines, Inc.'s ("United's") retired pilots, who have already had their benefits cut as a result of United's reorganization under Chapter 11 of the Bankruptcy Code, will suffer drastic, life-altering losses in retirement income if their defined benefit pension plan is terminated. They will lose the pension benefits they earned during their long careers serving United and the flying public, the benefits for which they negotiated in past collective bargaining sessions in lieu of immediate wages. Many retired pilots will lose more than 50 percent of their pension income in non-tax-qualified pension benefits, which are benefits that are not insured or protected by the Pension Benefit Guaranty Corporation ("PBGC").

The United Retired Pilots Benefit Protection Association's ("URPBPA's") appeals below, and this petition for certiorari, relate to United's contractual obligations to pay pension benefits it promised its retired pilots and the effect United's Chapter 11 petition had on these contractual obligations.[1] URPBPA asks this Court to decide whether a

[1] United recognized in its bankruptcy court pleadings that, in order to terminate the pilots' defined benefit pension plan, it had to terminate both the contractual obligations and its obligations under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1301 *et seq.*, that required it to maintain the plan. This appeal relates to questions regarding what United is required to do in order to terminate its contractual duties to pay pension benefits. This appeal does not address issues related to United's statutory duties under ERISA or the burden an employer or the Pension Benefit Guaranty Corporation ("PBGC") must satisfy in order to terminate a defined benefit plan under ERISA's

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Chapter 11 debtor is required to negotiate in good faith with an authorized representative for retirees and satisfy the other requirements of 11 U.S.C. § 1113 with respect to those retirees before it modifies or terminates its contractual obligation to pay retiree pension benefits.

B. The *Bildisco* Decision And The Enactment Of 11 U.S.C. § 1113

Section 1113 of the Bankruptcy Code was enacted shortly after the Supreme Court published its ruling in *National Labor Relations Board v. Bildisco and Bildisco*, 465 U.S. 513, 104 S. Ct. 1188 (1984). In *Bildisco*, all nine Justices agreed that an employer could reject a collective bargaining agreement under 11 U.S.C. § 365, a section of the Bankruptcy Code that permits the rejection of executory contracts, if the employer could satisfy a heightened "balance of the equities" standard.[2] But, in a controversial part of its ruling that split the Court in a 5-4 decision, the Court stated that a debtor who unilaterally rejects its collective bargaining agreement before obtaining court approval does not commit an unfair labor practice under the National Labor Relations Act. Congress reacted immediately to this part of the Court's ruling and enacted 11 U.S.C. § 1113. See *Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of America*, 791 F.2d 1074, 1081-84 (3rd Cir. 1986) (describing Congress' reaction to the *Bildisco* decision and the enactment of 11 U.S.C. § 1113); Athanassios Papaioannou, *The Duty to Bargain and Rejection of Collective*

"distress termination" or "involuntary termination" provisions. See 29 U.S.C. § 1341(c)(2)(B)(ii)(IV); 29 U.S.C. § 1342.

[2] Typically, a debtor who seeks to reject an executory contract under 11 U.S.C. § 365 is only required to satisfy the lenient "business judgment" standard by showing that the rejection of a contract is in the best interest of the bankruptcy estate. Because bankruptcy courts are expected to take labor law considerations into account when making decisions that implicate federal labor law concerns, the Court held that a heightened standard should apply when a debtor seeks to reject a collectively bargained agreement.

Bargaining Agreements Under Section 1113 By A Bankrupt Airline: Trying To Reconcile R.L.A. With Bankruptcy Code, 13 Transp. L.J. 219, 225-28 (1990) (same); Donald B. Smith & Richard A. Bales, *Reconciling Labor Law and Bankruptcy Law: The Application of 11 U.S.C. § 1113*, 2001 L. Rev. Mich. St. U. Det. C.L. 1145, 1149-62 (Winter 2001) (same).

11 U.S.C. § 1113 establishes a framework under which a Chapter 11 debtor is required to exhaust the possibilities of negotiating a compromise with an "authorized representative" before it seeks to terminate any collectively bargained agreement. Under 11 U.S.C. § 1113(f), a debtor-in-possession may not "unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section [§ 1113]." The debtor must, first, "make a proposal to the authorized representative of the employees covered by such agreement, based on the most complete and reliable information available at the time of such proposal . . . " 11 U.S.C. § 1113(b)(1)(A) (*Century Brass*, which is discussed below, interprets the term "employees" in this section as including retired employees). The debtor must "provide . . . the representative of the employees with such relevant information as is necessary to evaluate the proposal," 11 U.S.C. § 1113(b)(1)(B), and " . . . meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such an agreement." 11 U.S.C. § 1113(b)(2). If an agreement between a debtor and an authorized representative cannot be reached, a hearing regarding the debtor's proposal will be held pursuant to § 1113(d)(1) and the debtor is required to prove that it has satisfied its § 1113 obligations and that the proposal made to the authorized representative includes only "those necessary modifications in the employee benefits and protections that are necessary to permit the reorganization of the debtor. . . ." 11 U.S.C. § 1113(b)(1)(A) and (c)(1) [3]

[3] For a discussion of the elements a debtor must satisfy in order to obtain § 1113 relief, see *In re Garofalo's Finer Foods, Inc.*, 117 B.R. 363

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C. The Second And Sixth Circuit Decisions In *Century Brass* and *Unimet*

In re Century Brass, 795 F.2d 265 (2nd Cir. 1986) was decided soon after § 1113 was enacted. After Century Brass Products, Inc. ("Century Brass") filed its Chapter 11 petition, it presented a series of proposals to its employees' union, the United Automobile, Aerospace & Agricultural Implement Workers of America ("UAW"), that called for the termination or modification of the defined benefit pension and medical plans that provided benefits to both active and retired employees. The UAW told Century Brass that it would not consider any proposal that would affect the vested retirement rights of retired employees because it was not the authorized representative for the retirees. Negotiations broke down and Century Brass obtained an order from the bankruptcy court, under § 1113, terminating their collective bargaining.

On appeal, the UAW argued that it had "good cause" to reject Century Brass' § 1113 proposals because the company failed to limit its proposals to matters pertaining to the active employees' benefits. The union argued that, because Century Brass and UAW had no right to negotiate over the benefits of the company's retirees, Century Brass could not insist that the UAW bargain over proposals that included issues related to the retirees' vested benefits. Although the district court affirmed the bankruptcy court's order, the Second Circuit Court of Appeals agreed with the UAW and reversed.

In reaching its decision, the Second Circuit relied heavily on *Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 92 S. Ct. 383 (1971). In that case, the Supreme Court held that an employer may negotiate directly with its retired employees over the modification of their vested retirement rights and

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(N.D. Ill. 1990); *Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of America*, 791 F.2d 1074 (3rd Cir. 1986) and *Truck Drivers Local 807 v. Carey Transportation, Inc.*, 816 F.2d 82 (2nd Cir. 1987).

benefits. The Court stated that unions should not be forced to represent its retirees in negotiations with an employer because forcing a union to represent both active employees and retirees can "create the potential for severe internal conflicts" and create the risk that "union representatives may see fit to bargain for improved wages or other conditions favoring active employees at the expense of retirees' benefits." *Pittsburgh Plate Glass*, 404 U.S. at 173, 92 S. Ct. at 394. The Supreme Court also held that "[u]nder established contract principles, vested retirement rights may not be altered without the pensioner's consent." *Id.*, 404 U.S. at 182 n.20, 92 S. Ct. at 399 n.20.

The *Century Brass* court held that, in order to promote the policies of flexibility and equity built into the Bankruptcy Code, retired employees are "employees" under § 1113. *Century Brass*, 795 F.2d at 274-75. The court stated that "if retiree benefits are subjects of bargaining between the union and the employer, and no modification can occur absent the retirees' consent, those retirees must be represented in the negotiations." *Id.* at 274. The court also observed that, because it "may not always be appropriate for a union to represent both active and retired workers in modification negotiations," when a conflict between active and retired employees exists, or when the union will not represent its retirees, "a representative for the class of retirees should be appointed by the bankruptcy judge" so that the retired employees will have a bargaining agent and representative throughout the § 1113 proceedings. *Id.* at 275. According to the court, retirees should be represented during any negotiation regarding their vested, retirement benefits, even if the employer is in the midst of a Chapter 11 reorganization.

The court stated that, while the appointment of an authorized representative for retired employees in § 1113 negotiations and proceedings "departs somewhat from a literal reading of § 1113, well-established precedent for an appointment of this sort is found in other areas of the law." *Id.* The Second Circuit then reversed the bankruptcy court's § 1113 order and remanded the case "with instructions to the bankruptcy court to appoint a representative for the

retired employees of the debtor, and for such further proceedings under § 1113 as are appropriate." *Id.* The court held that Century Brass failed to satisfy the procedural and substantive requirements of § 1113 because it "failed to meet its threshold burden of negotiating with a representative of the company's retired employees covered by" the collective bargaining agreement. *Id.* at 276.

The Sixth Circuit Court of Appeal's opinion in *In re Unimet Corp.*, 842 F.2d 876 (6th Cir. 1988) also held that § 1113 protections apply to retiree benefits. The *Unimet* court stated that its "reading of 11 U.S.C. § 1113 leads us to the conclusion that Congress intended to give broad protection to collectively bargained for rights which are threatened by a corporate reorganization under Chapter 11 of the Bankruptcy Code." *Unimet*, 842 F.2d at 885. The *Unimet* court identified numerous statements from the legislative history of § 1113 which indicate that when Congress enacted § 1113, it intended to protect the collectively bargained pension rights of both active and retired employees. The court concluded as follows: "[b]y requiring the debtor-in-possession to establish that the equities militate in favor of rejection of the benefits collectively bargained for on behalf of retirees, we believe we strike the appropriate balance between the interests of the debtor-in-possession in effectuating a reorganization and the interests of the retirees who have achieved through the collective bargaining process some measure of security." *Id.* at 876-78.

D. The LTV Bankruptcy And The Enactment of 11 U.S.C. § 1114

The enactment of the legislation that has now become codified at 11 U.S.C. § 1114 was based upon Congress' reaction to a situation where a Chapter 11 debtor, LTV Steel Co., Inc., believed it had the right to unilaterally terminate the life and health insurance benefits of its 78,000 retirees. See *In re Chateaugay Corp.*, 64 B.R. 990 (Bankr. S.D.N.Y. 1986) (summarizing the facts surrounding the LTV bankruptcy); Gabriel J. Minc, *Bankruptcy and Employee Benefit Plans*, A.B.A. Center for C.L.E., N-25, N-46 (1998), *available at* N98EBAB ABALGLED N-25 (Westlaw); Lewis Kruger,

Chapter 11 and Plan Formulation, PLI Comm. L. & Prac., 850-62 (Nov.-Dec. 2001), *available at* 828 PLI/Comm 745 (Westlaw). Although the members of Congress who drafted Bankruptcy Code § 1113 stated that they believed § 1113 protected against the unilateral termination of all collectively bargained benefits, including the health and life insurance benefits LTV stopped paying when it entered into bankruptcy, 11 U.S.C. § 1114 was enacted to ensure that the insurance-based benefits of retirees are protected regardless of whether the benefits are collectively bargained.[4] See *Oversight on the LTV Corporation Filing For Bankruptcy Under Chapter 11 of the Federal Bankruptcy Code: Hearing Before the Committee on the Judiciary, United States Senate*, 99th Cong. 1-80 (1986) (members of Congress and Professor Vern Countryman stated that LTV violated § 1113 when it discontinued retiree medical benefits, but members of Congress also stated that new legislation would be enacted to force LTV to continue paying insurance benefits and to reinforce the law).

E. The United Air Lines, Inc., The Air Line Pilots Association, International And The Pilots' Defined Benefit Plan

United Air Lines, Inc. ("United"), the primary subsidiary of UAL Corporation, operates one of the world's largest commercial airlines. United has employed and continues to employ commercial airline pilots under agreements it has negotiated with the Air Line Pilots Association, International ("ALPA"), the union that represents United's active pilots. ALPA does not represent United's retired pilots.

The defined benefit plan that provides pension benefits to United's retired pilots is called the United Airlines Pilot Defined Benefit Pension Plan (the "Pilot Plan").[5] The

[4] 11 U.S.C. § 1114(c) relates to collectively bargained retiree insurance benefits. 11 U.S.C. § 1114(d) expands protections to retiree insurance benefits that are not covered by a collective bargaining agreement.

[5] A "defined benefit plan" is a pension plan that guarantees participants a specific level of retirement income. A defined benefit plan is distinguished from "defined contribution plan," which is a pension

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1999 Amendment and Restatement of the Pilots' Plan makes it clear that the defined benefit plan provides contractually vested benefits for retirees who satisfy the plan's vesting requirements.

In addition, because § 415 of the Internal Revenue Code ("I.R.C.") places a limit on the amount an employer can contribute to a "tax-qualified" pension plan on behalf of any one employee, ALPA and United have executed Letter Agreement 85-10 and Letter Agreement 92-10 in order to provide a mechanism for the payment of contractually agreed benefits from the Pilot Plan that exceed I.R.C. limits. Section B(1)(a) of Letter Agreement 85-10 states that United "will agree to pay to pilots or their spouses, beneficiaries or estates, as the case may be, the difference between a) the benefits to which a pilot would have been entitled under the Qualified Plans but for the limitations of Section 415 of the Internal Revenue Code, and b) the amount of benefits to which a pilot is entitled under the Qualified Plans after taking into account the limitations of Section 415." Section B(1)(b) of the agreement states that "payments of the difference are to be made under a non-qualified program and shall be made at the same time and in the same manner as payments are made under the Qualified Plan." As a result of Letter Agreements 85-10 and 92-10, (which have been incorporated by reference into each subsequent collective bargaining agreement between ALPA and United), retired pilots became eligible to receive pension benefits from the "tax-qualified" and the "non-tax-qualified" parts of the Pilot Plan.[6]

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plan that does not guarantee participants any specific level of retirement income but, instead, sets up an individual account for each participant so that contributions can be made into that account by an employer, an employee or both.

[6] Non-tax-qualified pension benefits do not receive the same statutory protections under ERISA as tax-qualified benefits and are not insured by the PBGC. As a result, retirees seeking to enforce their non-qualified pension benefits are forced to rely primarily upon their contractual rights.

F. United's Chapter 11 Proceedings And The Formation Of URPBPA

On December 9, 2002, UAL Corporation, and its related companies, including United, filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. That same month, a group of retired United pilots formed and incorporated URPBPA under Illinois law. URPBPA was created to protect the retirement benefits of pilot retirees, survivors and dependents (referred to generally as "retired pilots") because, as stated above, ALPA will not represent the interests of United's retired pilots.[7] URPBPA's Board of Directors consists of seven retired United Captains (Roger Hall, Dennis D. Dillon, Gerard Terstiege, Eugene M. Cummings, Raymond P. Fink, James M. Krasno and William L. Rutherford) and Lise Bentsen, a survivor of a deceased United pilot. URPBPA's membership consists of more than half of United's approximately 6,000 retired pilots. URPBPA is the only organization of retired pilots that appeared in connection with United's bankruptcy proceedings in an effort to protect the retired pilots' pension benefits.

As a result of other proceedings and orders entered in United's bankruptcy, retired pilots have lost their life insurance benefits and have had their medical benefits reduced significantly. Many retired pilots suffered additional losses when the United stock they obtained from United's employee stock ownership plan was rendered valueless during United's Chapter 11 proceedings.

G. United's Section 1113 Motion, URPBPA's Motion For The Appointment Of An Authorized Representative and The Bankruptcy Court's Approval of Letter Agreement 05-01

In the summer and fall of 2004, United stated that it was considering seeking the termination of the Pilot Plan

[7] All of the other unions representing United's active employees represented their retired employees throughout United's Chapter 11 proceedings.

and three of its other defined benefit plans. United recognized in its bankruptcy court filings that it needed to go through a two-step process in order to terminate any of its defined benefit plans. In step one, United would need to satisfy the requirements of 11 U.S.C. § 1113 and remove the contractual obligations that required it to maintain its plans. In step two, United would need to satisfy ERISA's distress termination provisions. See 29 U.S.C. § 1341(c)(2)(B)(ii)(IV).

In November and December of 2004, United made a series of filings which sought to schedule a § 1113 hearing (and various pre-hearing deadlines) and present arguments in favor of the termination of its pension plans. United stated that it was "presenting its unions with proposals to modify the Company's collective bargaining agreements" and stated that "[p]art of the Company's proposal to its unions is to remove any requirement in the collective bargaining agreements that the Company maintain defined benefit pension plans." United stated that it was "committed to attempting to negotiate agreements with its unions" but that, in the event agreements could not be reached, it sought authority to reject its collective bargaining agreements with all of its unions, including ALPA. Although United cited the nine requirements a debtor must satisfy in order to terminate collectively bargained rights under § 1113, as those requirements are described in *In re Garofalo's Finer Foods, Inc.* 117 B.R. 363, 370 (Bankr. N.D. Ill. 1990), the motion did not state how United would satisfy these requirements, or any others, with respect to the rights of its retired pilots. Rather, United's motion assumed that, as long as it could reach an agreement with ALPA and its active pilots, it could remove any contractual obstacle that would otherwise prevent it from terminating the Pilot Plan.

On December 10, 2004, URPBPA filed with the bankruptcy court its Emergency Motion to Appoint Section 1113 Authorized Representative For United's Retired Pilots In Connection With Debtors' Authority to Reject Their Collective Bargaining Agreements ("Motion to Appoint"). In this motion, URPBPA argued that an authorized representative should be appointed, pursuant to 11 U.S.C. § 1113, to represent United's retired pilots and their vested pension

benefits. URPBPA informed the Court that all of United's unions except ALPA were representing their retirees. United and ALPA were, in fact, conducting closed-door bargaining sessions during the time this motion was filed over the fate of the Pilot Plan. Representatives for the retired pilots were not allowed to participate.

On December 14, 2004, the bankruptcy court denied URPBPA's Motion to Appoint. The bankruptcy court compared 11 U.S.C. § 1113 with 11 U.S.C. § 1114 and stated:

> . . . the first is a motion to be appointed as section 1113 authorized representative. If I'm not mistaken, there's no such thing. Section 1114 calls for the appointment of an authorized representative for retirees who are not being represented by their union in connection with the change in retiree medical benefits. But there's no parallel provision in section 1113.

(App. at 24). The court stated that while it did not "take it that there's any objection about your participating ***to some extent***" (emphasis supplied), it also said "[t]here's no requirement now for the debtor to be negotiating with retired pilots." (App. at 24). When URPBPA's attorney commented that, unless an authorized representative was appointed to represent United's retired pilots, United and ALPA could be bargaining away the vested pension rights of United's retired pilots, the court said "they're perfectly free to do that." (App. at 26).

Although the court said URPBPA could participate in any § 1113 hearing that related to the Pilot Plan, the court made it clear that United's retired pilots would not be permitted to participate in any other part of the § 1113 negotiation process and would not be permitted to use § 1113 protections to defend their pension benefits. The court stated that URPBPA's "participation is allowed solely because it might have an impact on the later determination that the court would be required to make in a[n ERISA] distress termination proceeding where your clients would unquestionably have standing to participate." (App. at 28).

As a result of their § 1113 negotiations, United and ALPA reached an agreement on December 16, 2004, and, on January 31, 2005, ALPA's membership ratified a modified version of that agreement (which is known as Letter Agreement 05-01) and the bankruptcy court approved the agreement that same day. Letter Agreement 05-01 states that ALPA will not object to any motion United may file seeking the distress termination of the Pilot Plan under 29 U.S.C. § 1341 of ERISA if United complies with certain terms outlined in the agreement and, in addition, gives ALPA replacement benefits for active pilots which include $550 million in convertible notes, access to a new profit sharing plan, a new defined contribution plan and other benefits. The agreement gives United's retired pilots nothing, even though it contemplates the termination of the Pilot Plan and cessation of United's obligation to pay pension benefits, including benefits that are not insured by the PBGC.

H. URPBPA's District Court Appeals

URPBPA appealed the bankruptcy court's December 14, 2004 order denying its Motion to Appoint and then appealed the bankruptcy court's January 31, 2005 order approving Letter Agreement 05-01. On February 14, 2005, the district court dismissed URPBPA's first appeal, observing that the essential remedy URPBPA sought was the "voiding of any agreement (the revised CBA) that United and ALPA reach that affects the vested pension rights of United's retired pilots." Because URPBPA had "already appealed the bankruptcy court's approval of the revised CBA by its order of January 31, 2005, in which it intends to seek the same remedy sought here," the court ruled that URPBPA's first appeal could be dismissed in light of URPBPA's second appeal. Then, on June 22, 2005, the district court dismissed URPBPA's second appeal, *United Retired Pilots Benefit Protection Association v. United Air Lines, Inc.*, No. 05-C-1202, 2005 WL 1528259 (N.D. Ill. June 22, 2005), stating that because the Pilot Plan had not yet been terminated, URPBPA did not have a right to appeal at that time.

I. The Seventh Circuit Affirms The District Court On Different Grounds

On March 31, 2006, two months after United confirmed a Chapter 11 plan and emerged from bankruptcy, the Seventh Circuit Court of Appeals issued an opinion affirming the district court on different grounds. *United Retired Pilots Benefit Protection Association v. United Airlines, Inc.*, 443 F.3d 565 (7th Cir. 2006). The Seventh Circuit opinion disagreed with the district court and stated that URPBPA's appeal was not interlocutory because the January 31, 2005 order approving Letter Agreement 05-01 "was the equivalent of a final judgment in a suit for breach of contract, and therefore appealable as concluding a severable phase of the bankruptcy proceeding." *United Retired Pilots*, 443 F.3d at 569. The court also did not grant a motion filed by United to dismiss the appeal as "moot" and stated that, despite United's argument, the bankruptcy judge could still conduct a § 1113 hearing in a way that would not jeopardize United's "newly recovered solvency." *Id.* at 567. But, ultimately, the court affirmed the lower courts and ruled that even if the bankruptcy court should have conditioned approval of Letter Agreement 05-01 "on the retired pilots' being made negotiating partners with United and the union, there is no longer any feasible remedy that a court could order." *Id.* at 572-73.

The Court recited a number of facts related to this dispute and distinguished between the tax-qualified and non-tax-qualified pension benefits to which United's retired pilots are entitled.[8] The court correctly noted that, because the bankruptcy court denied URPBPA's Motion to

[8] At the beginning of the opinion, the Seventh Circuit stated that the bankruptcy court and the district court "allowed United to eliminate the contractual pension rights of its 3,000 or so retired pilots without a hearing to determine whether they should receive 'replacement' benefits (compensation for giving up those rights), which United had given its active pilots." While the Court's statement is mostly correct, it should be noted there are actually about 6,000 retired pilots enrolled in the Pilot Plan (over 3,000 of which are members of URPBPA).

Appoint, ALPA and United did not allow retired pilots to participate in negotiations that took place regarding their pension benefits.[9] The court observed that, if the retired pilots had been permitted to participate in § 1113 negotiations regarding the termination of the Pilot Plan, these negotiations may have caused United to provide "replacement benefits" to the retired pilots as well as the active pilots. The court emphasized throughout its opinion that "the retired pilots received not merely lower replacement benefits than the active pilots; they received nothing – and with no opportunity to have negotiated for something." *Id.* at 570.

The court explained that, after United and ALPA reached their agreement during the § 1113 process, the PBGC filed a petition for the "involuntary termination" of the Pilot Plan under 29 U.S.C. § 1342 and (after a September 2005 trial) this petition was granted by the bankruptcy court.[10] While describing certain factors related to

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[9] Although the Court was puzzled regarding the purpose of URPBPA's Motion to Appoint, URPBPA's motion was necessitated by the fact that URPBPA did not represent all of United's retired pilots. Even if URPBPA had reached an agreement with United regarding the terms under which URPBPA would have agreed to the termination of the Pilot Plan, this agreement would not have bound all of United's unrepresented retired pilots. Consistent with the ruling in *Century Brass*, URPBPA sought the appointment of a representative authorized to represent and negotiate on behalf of all of United's retired pilots.

[10] Judge Posner's opinion indicates that the bankruptcy court order granting the PBGC's petition and terminating the Pilot Plan (see the bankruptcy court rulings in the PBGC termination case at *In re UAL Corp.*, 02-48191, 2005 WL 2840266 (Bankr. N.D. Ill. Oct. 26, 2005) and *In re UAL Corp.*, 333 B.R. 802 (Bankr. N.D. Ill. 2005)) was on appeal to the district court. These district court appeals have been resolved. First, District Court Judge John Darrah reversed the bankruptcy court, stating that it did not have the jurisdictional authority to enter an order terminating the Pilot Plan. *In re United Air Lines, Inc.*, 337 B.R. 904 (N.D. Ill. 2006). The case was remanded and the bankruptcy court issued findings of fact and conclusions of law to the district court. On June 13, 2006, District Court Judge Joan Lefkow entered a Memorandum Opinion and Order accepting a modified version of the recommendations of the bankruptcy court and entering a judicial decree terminating the Pilot Plan. URPBPA has appealed Judge Lefkow's order to the Seventh Circuit Court of Appeals.

the PBGC's termination insurance program, the court noted that the PBGC "does not replace any non-tax-qualified benefits" and the PBGC's guaranty of tax-qualified benefits is limited by the PBGC's maximum guaranty.[11] *Id.* at 569.

The court also made a number of legal observations and rulings. The court dismissed United's argument that the enactment of 11 U.S.C. § 1114 somehow implies that no retiree representative need be appointed for negotiations pursuant to 11 U.S.C. § 1113 and stated that "there is no indication that Congress was specifying or disallowing procedures to be used in section 1113 proceedings" when it enacted § 1114. *Id.* at 571. But the court also concluded that, because the retired pilots were not parties to the collective bargaining agreement ALPA and United sought to modify in December 2005, and because, in the court's opinion, the retired pilots were not third-party beneficiaries of that agreement, ALPA and United would ordinarily be "free to modify it without regard to the impact on the financial interests of third parties who are not third-party beneficiaries."[12] *Id.* Because United was in bankruptcy, though, the opinion stated that the bankruptcy court had an obligation to consider the impact of agreements "not in the ordinary course" on United's other creditors, including the retired pilots.

While the court believed United's retired pilots may have had some form of "potential blocking power" based upon their status as bankruptcy creditors and potential

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[11] For many of United's retired pilots, the amount of post-termination benefits the PBGC will pay will be significantly less than United's pension obligation under the tax-qualified portion of the Pilot Plan. As a result, many of United's retired pilots stand to lose a portion of their tax-qualified pension benefits and all of their non-tax-qualified benefits, which are not insured by the PBGC.

[12] URPBPA's argument to the Seventh Circuit had been that, even though United and ALPA are free to modify their agreements regarding the terms and conditions of employment for active pilots, they cannot enter into a new collective bargaining agreement that purports to terminate separate and distinct contractual obligations United has to the retired pilots (which are vested contractual obligations to which ALPA is not a party).

participants in any upcoming ERISA termination proceeding, and the court also stated that United could have attempted to "buy" from the retired pilots an agreement (similar to Letter Agreement 05-01) wherein the retired pilots agreed not to oppose the termination of the Pilot Plan, the court did not base its ruling on any recognition that the retired pilots had vested contract rights that are independent of the current collective bargaining arrangements between ALPA and United. Despite the court's observation that the bankruptcy court approved Letter Agreement 05-01 "without giving any consideration to the retired pilots' interests," the Seventh Circuit also concluded that the retired pilots "probably" did not have the right to protect their pension benefits in a § 1113 proceeding.[13]

REASONS FOR GRANTING THE PETITION

I. The Affirmed Bankruptcy Court Orders Refusing To Appoint An Authorized Representative To Protect The Retired Pilots' Contractual Pension Rights And Approving Letter Agreement 05-01 Lack Legal Justification, Are At Odds With Notions Of Fundamental Fairness And, If Not Corrected, Will Affect The Lives Of Thousands Of Retired Pilots.

The fundamental question presented is how could a bankruptcy court allow an employer, reorganizing under Chapter 11 of the Bankruptcy Code, and a union to strip retired employees of their contractual rights without providing them the opportunity to protect their interests under 11 U.S.C. § 1113? What legal support could the bankruptcy court have for ruling that an employer and a union are "perfectly free" to bargain away the vested pension rights of the employer's retirees while enriching the active employees with replacement benefits in the event of a pension plan termination? If employees retire after spending their lives

[13] The Court did say *Century Brass* "injects some uncertainty concerning the retired pilots' rights in a section 1113 proceeding." *Id.* at 571.

working for an employer and paying union dues, can the employer file for bankruptcy and then enter into closed-door negotiations with the union to take these pensions away from the retirees?

This Court should review the rulings issued below because the bankruptcy court had no legal justification for denying URPBPA's Motion to Appoint and approving Letter Agreement 05-01, because the bankruptcy court's orders are unfair and because the elimination of the retired pilots' pension rights has impacted and will continue to affect thousands of retirees. If not reversed, the bankruptcy court's rulings could set dangerous precedents for other courts while presenting a roadmap for Chapter 11 debtors seeking to rid themselves of obligations from their most vulnerable creditors – their retired employees.

The Pilot Plan provides collectively bargained, vested pension rights to United's retired pilots. United's obligation to pay pension benefits extends to each of United's retired pilots under the terms of the collective bargaining agreement that was in place at the time each former pilot retired. United has never disputed this because it is beyond dispute that when an employer promises lifelong benefits to its retirees, that promise is enforceable.[14] When an employer

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[14] The Courts of Appeals agree that an employer's promise to pay lifetime, vested benefits constitutes an enforceable contractual obligation. See *Hoefel v. Atlas Tack Corp.*, 581 F.2d 1, 4-6 (1st Cir. 1978) (under contractual vesting, once an employee complies with conditions entitling him or her to participate in a plan, his rights cannot be divested by employer); *United Steelworkers of America, AFL-CIO v. Textron, Inc.*, 836 F.2d 6, 9 (1st Cir. 1987); *American Federation of Grain Millers, AFL-CIO v. International Multifoods Corp.*, 116 F.3d 976, 980 (2nd Cir. 1997) ("if an employer promises vested benefits, that promise will be enforced"); *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W. v. Skinner Engine Co.*, 188 F.3d 130, 137-47 (3rd Cir. 1999) (employer may agree to provide for lifetime vesting even in plans where vesting not required under ERISA); *Rochester Corp. v. W.L. Rochester*, 450 F.2d 118, 122 n.6 (4th Cir. 1971) (contractual provisions granting right to vested pension benefits must be enforceable to prevent contractual promise from being purely illusory); *Gable v. Sweetheart Cup Co., Inc.*, 35 F.3d 851, 855 (4th Cir. 1994); *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 937 (5th Cir. 1993)

(Continued on following page)

promises vested benefits in a collective bargaining agreement or plan document, those promises remain enforceable even after the collective bargaining agreement expires. See *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 607 (7th Cir. 1993) citing *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 207, 111 S. Ct. 2215, 2226 (1991) ("Rights which accrued or vested under the [collective bargaining] agreement will, as a general rule, survive termination of the agreement").[15] When employers and unions negotiate new

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(employer may enter into contractual obligations requiring it to provide lifetime benefits to retirees in situations where it would not otherwise be required to do so under ERISA); *Yolton v. El Paso Tennessee Pipeline Co.*, 435 F.3d 571, 581 (6th Cir. 2006) ("parties to CBAs can agree to vest benefits beyond the termination of the agreement"); *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1982); *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 607 (7th Cir. 1993); *Anderson v. Alpha Portland Industries, Inc.*, 836 F.2d 1512, 1516 (8th Cir. 1988); *Bower v. Bunker Hill Co.*, 725 F.2d 1221, 1223 (9th Cir. 1984); *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1510-14 (10th Cir. 1996) (benefits vested under contract with an employer are nonforfeitable); *United Steelworkers of America, AFL-CIO v. Connors Steel Co.*, 855 F.2d 1499, 1504-05 (11th Cir. 1988).

[15] See also *Yolton v. El Paso Tennessee Pipeline Co.*, 435 F.3d 571, 581 (6th Cir. 2006) ("the retirement package available to someone contemplating retirement will change with the expiration and adoption of CBAs, but someone already retired under a particular CBA continues to receive the benefits provided therein despite the expiration of the agreement itself"); *United Steelworkers of America, AFL-CIO v. Textron, Inc.*, 836 F.2d 6, 9 (1st Cir. 1987) ("The contract language . . . is consistent with a Textron promise to pay retirees' insurance costs throughout their retirement, even after the particular collective bargaining agreement expires"); *Keefer v. H.K. Porter Company, Inc.*, 872 F.2d 60, 62 (4th Cir. 1989) ("In determining whether an employer's obligation to provide benefits to its retirees or their surviving spouses continues beyond the expiration of the collective bargaining agreement, we look to the parties' intent as expressed in their agreement"); *International Assoc. of Machinists and Aerospace Workers v. Masonite Corp.*, 122 F.3d 228, 233 (5th Cir. 1997) (the renegotiation or termination of an agreement between a union and an employer has no effect on benefits that have already become contractually vested); *United Steelworkers of America, AFL-CIO v. Connors Steel Co.*, 855 F.2d 1499, 1504-05 (11th Cir. 1988) ("The trial court was clearly correct in deciding that Connors' obligation to provide the [retiree] insurance benefits continued after the expiration of the negotiated labor contract.").

collective bargaining agreements, these new agreements do not divest retirees of their vested rights and benefits. A union employee who retires under a collective bargaining agreement that promises vested benefits has already lived up to his or her end of the bargain by providing years of work. It is the employer's turn to satisfy its contractual obligation to pay pension benefits.

Outside of bankruptcy protection, an employer can only modify the vested retirement benefits of its retired employees with the actual consent of its retirees. See *Pittsburgh Plate Glass*, 404 U.S. at 182 n.20, 92 S. Ct. at 399 n.20 ("[u]nder established contract principles, vested retirement rights may not be altered without the pensioner's consent").[16] Outside of these Chapter 11 proceedings, neither United nor ALPA could have divested United's retired pilots of their contractually vested pension rights without the actual consent of the retired pilots. Therefore, the important question here is, to what extent are a retiree's vested pension rights entitled to protection when a debtor like United files a Chapter 11 petition?

Neither United nor any of the courts below have identified a provision in the Bankruptcy Code that states that an employer can unilaterally eliminate a retiree's contractual right to receive pension benefits after it enters into Chapter 11 proceedings. If a retiree is not entitled to protect his or her

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[16] See also *Yard-Man*, 716 F.2d at 1478-88 (although retirees may negotiate directly with their former employer regarding the modification of their vested retirement benefits, such benefits may not be unilaterally changed by the employer); *Local Union No. 150-A, United Food and Commercial Workers v. Dubuque Packing Co.*, 756 F.2d 66, 70 (8th Cir. 1985) ("The status of a retiree cannot be affected by future negotiations or agreements between the Company and the Union; neither can act on behalf of retirees. . . . Because the [retirees'] right to benefits has become vested and the retirees are not part of the collective bargaining process, the Company's claim that it may implement its final offer to the retirees of lower benefits, because it has bargained to impasse, is without merit"); *Turner v. Local Union No. 302*, 604 F.2d 1219, 1225 (9th Cir. 1979) ("Under Allied Chemical, supra, it is clear that appellant's consent would be required to deprive him of any of his vested pension rights"); *Bower v. Bunker Hill Co.*, 725 F.2d 1221, 1223 (9th Cir. 1984).

pension benefits under 11 U.S.C. § 1113 and participate in § 1113 negotiations and proceedings, by what provision of the Bankruptcy Code does an employer, who would be absolutely prohibited from modifying or terminating a retired employee's vested benefits without the retiree's consent outside of bankruptcy, have the authority to terminate a retiree's contractual right to receive a pension?

While United recognized it could not terminate the Pilot Plan without negotiating with ALPA over the contractual obligations in its current collective bargaining agreement, United and the courts below failed to recognize the contractual obligations United had to the retired pilots. United always has the right to negotiate and enter into new collective bargaining agreements that affect the active employees' wages and benefits. Retirees have no right to interfere with agreements that only affect the rights of active workers. But, inside or outside of bankruptcy, an employer and union do not have the right to enter into an agreement that changes or terminates the retired employees' contract rights.

United has asserted that 11 U.S.C. § 363(b)(1) provides a legal justification for the bankruptcy court's approval of Letter Agreement 05-01. But § 363(b)(1) does nothing more than give a bankruptcy court authority to approve contracts that are "out of the ordinary course of business." It does not give Chapter 11 debtors the right to cancel retiree obligations.[17]

It is fundamentally unfair, and contrary to fundamental principles of American law, for two parties to negotiate

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[17] Even if the collective bargaining agreements under which the retired pilots' pension benefits became vested were deemed to be nothing more than ordinary executory contracts, United would still have to comply with the requirements of 11 U.S.C. § 365 in order to terminate the retired pilots' contractual rights (the courts below have failed to suggest that United even had to do this). But the rights of the retired pilots are more than ordinary contractual obligations. They are contractual rights that were collectively bargained and they are entitled to protection under 11 U.S.C. § 1113.

over and take rights away from a third party who has been denied access to those negotiations. Bankruptcy law does not allow two parties to negotiate over and take property away from a third party. It is manifestly unfair for an employer and a union to use the pension rights of retirees as bargaining chips in negotiations that are conducted solely for the benefit of the union and the employer.

The fundamental unfairness here is similar to the unfairness in *Hurd v. Hutnick*, 419 F. Supp. 630 (D.N.J. 1976), a case where an industry association and a union agreed to enter into a new collective bargaining agreement that purported to terminate the retirees' pension plan while providing new pension plans and other lucrative benefits to the active employees. Retirees were not allowed to participate in the negotiations that led to the union's agreement to "sell their old people down the river." *Id.* at 637 n.1, 650. The court framed the issue as follows: "when employers who have previously entered into a multi-employer pension plan find the plan too expensive to maintain, may they enter into a new agreement with the union extinguishing the pension fund by eliminating further contributions to it, while making no provision for the financial protection of some 1400 former employees who have retired and are currently receiving pension benefits from the fund?" *Id.* at 637.

The court found that because the collective bargaining agreements and plan documents that adopted the pension plan had promised former employees lifetime pension benefits upon retirement, any attempt by the union or employers to enter into a new agreement terminating the retirees' pension plan would be a violation of the retirees' vested contract rights. *Id.* at 637, 644-45. The court stated that the

> employee-pensioner's rights were fixed according to the terms and conditions of the collective bargaining agreement and pension plan in effect at the time he retired. No pensioner's benefits may be reduced by virtue of the provisions of a collective bargaining agreement executed after his retirement, when he was no longer a union member and therefore unrepresented at the negotiations.

Id. at 645. Furthermore, the court stated that the employers' attempts to revoke their promises of lifetime benefits, while providing new benefits to active workers, were unconscionable and would not be permitted by a court of equity. *Id.* at 655.

Just like in *Hurd*, United and ALPA have entered into a collective bargaining agreement that purports to terminate all of United's contractual obligations to pay pension benefits to the retired pilots. Just like in *Hurd*, United's retired pilots were not allowed to participate in the negotiations that led to active employees receiving millions of dollars in benefits in exchange for ALPA's agreement not to oppose termination of the Pilot Plan. The agreement reached between United and ALPA is just as unconscionable as the one reached in *Hurd* and should not have been approved.

The bankruptcy court's errors, if not reversed, will impact thousands of vulnerable United retired pilots who have already suffered through huge cuts in their retirement benefits. In addition, if this Court does not examine the problems created by the bankruptcy and Seventh Circuit rulings, which fail to recognize the importance of protecting retirees' vested contract rights during Chapter 11 proceedings, these decisions will provide a number of perverse incentives. First, the rulings will provide reorganizing debtors with incentives to ignore the pension rights of its retirees. Second, they will provide employers with incentives to file Chapter 11 petitions in order to extinguish vested contract obligations to retirees that could not be shed outside of bankruptcy without retiree consent. Third, these decisions will provide unions with incentives to bargain away the rights of their retired members.

This Court should clarify the purpose of § 1113 and provide guidance regarding the way in which bankruptcy courts are supposed to handle retired pilots' pension rights. This would help the lower courts establish uniform procedures that give retirees a fair opportunity to participate, negotiate and defend their rights. Clear ground rules would also help Chapter 11 debtors plan for reorganizations that are efficient, but still treat retirees equitably,

and would help unions understand how negotiations regarding plans that provide benefits to both active and retired union members should be conducted.[18]

II. This Court Should Grant Certiorari Because The Opinions And Rulings Issued Below Conflict With United States Supreme Court Precedent And Congress' Legislative Intent.

The opinions issued by the courts below should be reviewed and reversed because they are inconsistent with this Court's previous rulings and the legislative intent behind 11 U.S.C. § 1113. While the Second Circuit in *Century Brass* made an appropriately thorough analysis of *Pittsburgh Plate Glass* and *Bildisco* and, like the Sixth Circuit opinion in *Unimet*, analyzed the animating purposes behind the enactment of § 1113, the bankruptcy court and the Seventh Circuit ignored controlling Supreme Court precedent and the legislative intent behind § 1113.

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[18] A significant number of lower courts are deciding issues related to § 1113, including the United States Bankruptcy Court for the Southern District of New York, which issued a October 31, 2005 order in Delta Air Lines, Inc.'s ("Delta's") Chapter 11 proceedings. See *In re Delta Air Lines, Inc.*, No. 05-17923 (Bankr. S.D.N.Y. Oct. 31, 2005) (Docket No. 970). In this order, the bankruptcy court denied a motion filed by an organization of retired pilots (who, like here, ALPA refuses to represent) which sought to compel Delta to continue paying contractually vested pension benefits. The court denied the motion, stating that "only the Debtor may move for relief under Bankruptcy Code § 1113." The court's ruling missed the entire point of § 1113, which prohibits a Chapter 11 debtor from unilaterally terminating "any provisions of a collective bargaining agreement prior to compliance with the provisions of this section," 11 U.S.C. § 1113(f), and attempted to turn § 1113 from a shield that is supposed to protect collectively bargained benefits into a sword that can only be utilized by a Chapter 11 debtor. On appeal, the district court reversed the bankruptcy court stating that "a motion to compel is a procedurally proper means for a non-debtor party in interest to compel the debtor to comply with § 1113" and remanded for further proceedings. *Delta*, (Docket No. 33). It is likely that this bankruptcy court, and others, will continue to struggle to interpret § 1113 as it pertains to the rights of retired pensioners.

This Court has held that "[u]nder established contract principles, vested retirement rights may not be altered without the pensioner's consent." *Pittsburgh Plate Glass*, 404 U.S. at 182 n.20, 92 S. Ct. at 399 n.20. While the bankruptcy court stated that United and ALPA were "perfectly free" to negotiate away the retired pilots' pension rights, the bankruptcy court did not cite any authority for this conclusion and did not even attempt to address *Pittsburgh Plate Glass*. Rather than analyzing and applying principles enunciated by the Supreme Court and other courts that have struggled with issues related to the protection of collectively bargained retiree benefits, the court simply denied URPBPA's Motion to Appoint without citing any legal authority.

Amazingly, while the Seventh Circuit decision briefly cited another portion of the opinion, it ignored the above-quoted language from *Pittsburgh Plate Glass* and URPBPA's argument that United does not have the authority to unilaterally terminate the retired pilots' vested retirement rights. The Seventh Circuit was so focused on the current agreements between ALPA and United, it failed to take into account the fact that United had separate and distinct contractual obligations to its retired pilots. The Seventh Circuit opinion attempts to characterize the retired pilots as nothing more than third parties who have a non-enforceable interest in pension benefits maintained under ALPA and United's most recent collective bargaining agreement. This characterization is in direct conflict with *Pittsburgh Plate Glass*, which states that vested retirement rights may not be altered without a retiree's consent.

The Seventh Circuit's opinion and the lower court decisions are also inconsistent with this Court's instruction that bankruptcy courts avoid adopting standards that fail to protect collectively bargained rights or that are "fundamentally at odds with the policies of flexibility and equity built into Chapter 11 of the Bankruptcy Code" *Bildisco*, 465 U.S. at 524, 104 S. Ct. at 1196 (this is from the portion of the *Bildisco* decision that was not "legislatively overruled" by 11 U.S.C. § 1113). After the *Century Brass* court's exhaustive analysis of *Pittsburgh Plate*

Glass, *Bildisco* and the legislative history of § 1113, the Second Circuit followed the instructions in *Bildisco* and made rulings regarding the rights of retirees under § 1113 that it believed harmonized labor law, bankruptcy law and the rights of active and retired employees. Likewise, the Sixth Circuit in *Unimet* court ruled that bankruptcy courts should strike an equitable balance between "the interests of the debtor-in-possession in effectuating a reorganization and the interests of the retirees who have achieved through the collective bargaining process some measure of security." *Unimet*, 842 F.2d at 876-78.

In the instant case, the Seventh Circuit did not conduct a meaningful analysis of *Pittsburgh Plate Glass*, *Bildisco* or the animating purpose of § 1113. While the Seventh Circuit mentioned *Pittsburgh Plate Glass*, it did so without analysis and it failed to cite the relevant portion of the opinion. The Seventh Circuit did not cite the *Bildisco* opinion, analyze the history behind the enactment of § 1113 or attempt to balance the rights and interests of United, the active pilots and the retired pilots.

Requiring United and other Chapter 11 debtors to satisfy § 1113's requirements before terminating the contractually vested pension rights of retired workers strikes a reasonable and appropriate balance between the interests of Chapter 11 debtors and the rights of retirees. Any other interpretation or application of § 1113 in cases like this one leads to arbitrary results. All of United's unions except ALPA represented the rights and pensions of their retirees during United's § 1113 proceedings. By refusing to appoint an "authorized representative" for United's retired pilots, the bankruptcy court denied the retired pilots access to the entire § 1113 negotiating process, which is designed to give parties with collectively bargained rights "due process" before these rights are modified or extinguished. It is arbitrary and unfair to establish a rule that, for all practical purposes, results in situations where retirees whose rights are protected by their unions receive the full procedural and substantive protection of § 1113 while retirees who are not represented by their unions do not.

Because United's retired pilots did not have an authorized representative appointed on their behalf, they did not receive a § 1113 negotiation proposal, they were excluded from all negotiations regarding the Pilot Plan and they were denied access to the proposals exchanged between United and ALPA that related to the Pilot Plan. United's retired pilots were not given any ability to force United to prove that the termination of the Pilot Plan is, in fact, "necessary to permit the reorganization of the debtor" under 11 U.S.C. § 1113(b)(1)(A) and (c)(1).

This Court should also grant certiorari because the Seventh Circuit's opinion is based upon an interpretation of § 1113 that is inconsistent with Congress' legislative intent. As the *Unimet* court stated, a "discussion of 11 U.S.C. § 1113 is not complete without consideration of the circumstances precipitating its enactment" and, as the portions of the legislative record cited by the *Unimet* court show, Congress intended to protect retiree pension rights when it enacted § 1113. *Unimet*, 842 F.2d at 881-84. While *Century Brass* and *Unimet* both gave careful consideration to the context in which § 1113 was enacted, neither the Seventh Circuit nor the lower courts made similar analyses in this case. These rulings could cause other courts to ignore the legislative purpose that was served by the enactment of § 1113.

In addition, even though the Seventh Circuit corrected the bankruptcy court's misperception regarding the relationship between § 1113 and § 1114 of the Bankruptcy Code by stating that "there is no indication that Congress was specifying or disallowing procedures to be used in section 1113 proceedings" when it enacted § 1114, *United Retired Pilots*, 443 F.3d at 571, it would be helpful for this Court to clarify the relationship between § 1113 and § 1114 and provide guidance to the lower courts. Both sections of the Code were enacted as immediate reactions to situations where the rights of employees and retirees were under attack. By enacting these provisions, Congress showed that it wanted courts to give employees and retirees broad protections that are not available to other types of bankruptcy creditors. See also *In re Farmland Industries*, 294 B.R. 903,

915-19 (Bankr. W.D. Miss. 2003) ("It is clear that § 1113 is designed to provide protections to employees and retirees who are covered by collective bargaining agreements, and that § 1114 is designed to provide protections to those retirees who are covered by other plans, funds, or programs"). By granting this petition, this Court can ensure that Congress' intent behind § 1113 is enforced.

III. This Court Should Resolve The Split In Authority Between The Second And Sixth Circuit Courts Of Appeals And The Seventh Circuit Court Of Appeals.

The Second and Sixth Circuits and the Seventh Circuit have clear differences in their interpretations of § 1113 and their approaches to questions regarding a bankruptcy court's responsibility for protecting retirees' vested contract rights to their pensions. The Second and Sixth Circuit's interpretations of § 1113 are consistent with *Bildisco* because they interpret the provision in a way that balances the rights of retirees with the rights and obligations of Chapter 11 debtors and active employees while taking both labor and bankruptcy law into account. The Second Circuit's opinion in *Century Brass* and the Sixth Circuit's opinion in *Unimet* are also consistent with *Pittsburgh Plate Glass*. The Seventh Circuit's opinion in *United Retired Pilots* decision is not.

At the most important and fundamental level, the Second and Sixth Circuit opinions show that a retiree's benefits cannot be taken away unless the bankruptcy court allows the retirees an opportunity to defend their rights under § 1113. The *United Retired Pilots* decision, on the other hand, failed to reverse the bankruptcy court and does not provide United's retired pilots the opportunity to defend their contractually vested pensions under § 1113. In fact, the Seventh Circuit characterized the retired pilots as mere creditors who may have "some potential blocking power" but, ultimately, may not have been worth "buying off." *United Retired Pilots*, 443 F.3d at 572-73.

The differences between these two competing approaches is best exemplified by the actual rulings of the *Century Brass* and *United Retired Pilots* courts. In *Century*

Brass, the bankruptcy court entered an order allowing an employer to reject its collective bargaining agreement after the union refused to bargain away the contractually vested rights of its retirees. On appeal, the Second Circuit stated that an authorized representative should have been appointed to represent retirees in any negotiations with the debtor that involved the retirees' rights and benefits. The Second Circuit vacated the bankruptcy court order and "remanded with instructions that the bankruptcy court appoint a representative for the retired employees of the debtor, and for such further proceedings under § 1113 as are appropriate." *Century Brass*, 795 F.2d at 276.

In *United Retired Pilots*, the bankruptcy court approved an agreement between an employer and union that did not represent its retirees and a debtor even though the agreement provided for the termination of the retirees' contractually vested benefits. On appeal, the Seventh Circuit failed to recognize that the retirees had the right to the appointment of an authorized representative and failed to recognize that the retirees had the right to protect their contractually vested benefits under § 1113. Rather than vacating the bankruptcy court order, requiring the appointment of a representative for the retirees and ordering further proceedings under § 1113, the Seventh Circuit affirmed the bankruptcy court order, stating that, even if the retirees were entitled to some form of relief, too much time had passed for the court to devise an appropriate remedy.

By ruling that "there is no longer any feasible remedy that a court could order," *United Retired Pilots*, 443 F.3d at 572-73, the Seventh Circuit contradicted its earlier statement, in the first paragraph of its opinion, that "[a]ll the retired pilots are seeking in the first instance is a hearing before the bankruptcy judge, and we shall see that the judge could at that hearing deny any relief that would jeopardize United's newly recovered solvency." *Id.* at 567. Rather than making rulings based on facts that were not before the court, the Seventh Circuit, like the Second Circuit in *Century Brass*, should have remanded the case to the bankruptcy court for further proceedings under

§ 1113. It is certainly possible that United and the retired pilots could reach a compromise during § 1113 negotiations. If not, United would have the opportunity to prove, at a § 1113 hearing, that the retired pilots did not have "good cause" for rejecting United's negotiating proposals. But it was not for the Seventh Circuit to usurp Congress' authority, prevent these § 1113 negotiations from being conducted or speculate over the result of any § 1113 hearing that would take place.

This Court should grant certiorari in order to resolve the conflict between *Century Brass* and *Unimet*, on one hand, and *United Retired Pilots*, on the other, regarding the rights of retirees, unrepresented by a union, to protect under § 1113 their contractually vested pension benefits. Guidance from this Court will assist the lower courts in determining how vested pension rights should be handled in similar proceedings.

CONCLUSION

This Petition For A Writ Of Certiorari should be granted.

Respectfully submitted,

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443 F.3d 565

United States Court of Appeals,
Seventh Circuit.
In re: UAL CORPORATION, et al., Debtors.
United Retired Pilots Benefit Protection Association, et al.,
Appellants,
v.
United Airlines, Inc., et al., Debtors-Appellees.

No. 05-3121.

Argued Feb. 24, 2006.
Decided March 31, 2006.

Jack J. Carriglio (argued), Meckler, Bulger & Tilson, Chicago, IL, for Appellants.

David R. Seligman (argued), Kirkland & Ellis, Washington, DC, Peter D. DeChiara, Babette Ceccotti (argued), Cohen, Weiss & Simon, New York, NY, Stanley Eisenstein, Katz, Friedman, Eagle, Eisenstein & Johnson, Chicago, IL, for Debtors-Appellees.

Before BAUER, POSNER, and WILLIAMS, Circuit Judges.

POSNER, Circuit Judge.

In the course of United Airlines' bankruptcy, the bankruptcy judge, seconded by the district judge, allowed United to eliminate the contractual pension rights of its 3,000 or so retired pilots without a hearing to determine whether they should receive "replacement" benefits (compensation for giving up those rights), which United had given its active pilots. The association representing the retired pilots has appealed. (The *"et al."* parties on both sides of the case can be ignored.) Recently United emerged from bankruptcy, and it argues that this renders the appeal moot. That is incorrect. All that the retired

pilots are seeking in the first instance is a hearing before the bankruptcy judge, and we shall see that the judge could at that hearing deny any relief that would jeopardize United's newly recovered solvency. And there is no argument that the confirmed plan resolves the claims made by the retired pilots in this appeal.

United had a (frequently amended) collective bargaining agreement with the Air Line Pilots Association (ALPA) that among other things established defined-benefit pension plans for both active and retired pilots employed by United. The plans provided both tax-qualified and non-tax-qualified pension benefits; the distinctions relevant to this case are that the latter are not insured by the Pension Benefit Guaranty Corporation or protected by the provisions of ERISA relating to the termination of pension plans. 29 U.S.C. §§ 1321(a), (b)(8).

Normally a bankruptcy trustee, or as in this case a debtor in possession, can freely reject the executory portion of a contract. But section 1113 of the Bankruptcy Code permits the rejection of the executory portion of a collective bargaining agreement only with the approval of the bankruptcy judge after negotiations looking to mutually satisfactory modifications of the agreement, 11 U.S.C. § 1113(b)(2), and only if (the negotiations failing) the judge determines that "the balance of the equities clearly favors rejection of such agreement." § 1113(c)(3). Wanting to lift the albatross of pension obligations from its shoulders as well as to reduce the pilots' wages, United filed an application under section 1113 for rejection of the collective bargaining agreement and proceeded to the negotiation phase with ALPA. When ALPA made clear that it would not represent the interests of the retired pilots in the negotiations, the latter moved the bankruptcy judge to

appoint a representative to participate in the negotiations on their behalf. The purpose of the motion is a little obscure. The retired pilots already had a representative – the United Retired Pilots Benefit Protection Association, the appellant. What they really wanted was for the judge to order United and ALPA to negotiate with URPBPA as well. The judge denied, and as a result the retired pilots did not participate in the negotiations. The judge's refusal is one of the orders that the association is asking us to reverse.

While the section 1113 proceeding was going on, United and ALPA negotiated an agreement (the parties call this the "Letter Agreement") to modify the collective bargaining agreement. The modification was intended to eliminate the pension plans created by the agreement but compensate the active pilots, that is, the pilots represented by ALPA, by giving them convertible notes valued at $550 million and other consideration, including a defined-contribution pension plan. In exchange for these concessions ALPA agreed not to oppose United's attempt to terminate the collectively bargained pension plans under 29 U.S.C. § 1341, the provision of ERISA that governs the voluntary termination of pension plans.

With the agreement to modify the collective bargaining agreement, United's application under section 1113 to reject the agreement entered a state of suspended animation, since the modification of the collective bargaining agreement by the Letter Agreement would, if that agreement was approved, give United the relief it wanted without its having to persuade the bankruptcy judge to reject the collective bargaining agreement.

United asked the bankruptcy judge to approve the Letter Agreement under 11 U.S.C. § 363(b)(1), which requires that the bankruptcy judge's approval be obtained for contracts made by the debtor during the bankruptcy that are outside the ordinary course of business, as the Letter Agreement obviously was. The judge gave his approval, and this is the other order challenged on this appeal. The retired pilots argue that he shouldn't have approved the agreement without giving them a chance to participate in the negotiations for replacement benefits; such participation might, they argue, have resulted in their receiving replacement benefits too.

The order of approval extinguished any rights that the retired pilots might have had under the collective bargaining agreement. It was the equivalent of a final judgment in a suit for breach of contract, and therefore appealable as concluding a severable phase of the bankruptcy proceeding. *Bank of America, N.A. v. Moglia,* 330 F.3d 942, 944 (7th Cir.2003). The earlier order refusing to appoint a representative to negotiate with United and ALPA on the retired pilots' behalf over replacement benefits to compensate for the modification of the collective bargaining agreement was interlocutory, but interlocutory to the order extinguishing their contract rights and therefore reviewable by us with it.

After the bankruptcy judge approved the Letter Agreement, United withdrew its section 1113 motion for rejection of the collective bargaining agreement. The approval did not, however, terminate the pension plans. For that to happen an application had to be made to and approved by the bankruptcy judge under one of two sections of ERISA. Under the first, 29 U.S.C. § 1341 (voluntary termination), the employer asks for termination. Under

the second, 29 U.S.C. § 1342 (involuntary termination), the Pension Benefit Guaranty Corporation, which insures vested rights under ERISA pension plans, 29 U.S.C. § 1322(a); *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 637-38, 110 S.Ct. 2668, 110 L.Ed.2d 579 (1990), asks. United started down the voluntary-termination road, as we know, but withdrew when the PBGC applied for involuntary termination. The PBGC anticipated that if the pension plans were not terminated, and so continued generating new vested pension rights, the plans would go into default and as the insurer of those rights the PBGC would face a staggering liability.

The bankruptcy judge granted the PBGC's application in an order that is currently on appeal to the district court. Assuming the order is upheld, the PBGC will become the obligor of the retired pilots' vested pension rights, though only to a limited extent. Although airline pilots must retire at the age of 60, the PBGC does not begin to pay full benefits until the retiree reaches the age of 65. Also, as we noted earlier, it does not replace any non-tax-qualified benefits. And it pays a maximum of $44,388 in annual benefits to participants in plans terminated, as this one was, in 2004. What is more, while the benefits that PBGC will be paying the active pilots when they retire will be on top of the replacement benefits that United has given them in exchange for the surrender of their rights under the pension plans, the retirees have received no replacement benefits. They do have unsecured claims arising from their contractual pension rights, to the extent they're not compensated by the PBGC insurance, but according to the parties the value of those claims has not yet been determined by the bankruptcy court. (That's a puzzle; the retired pilots have debt claims and debt is converted to

stock in United's plan of reorganization and it isn't possible to confirm the plan without knowing who gets how much stock. But it not a puzzle we need to unravel in order to decide this appeal.) Nor do we know what fraction of the claims will actually be paid. All that is clear is that the retired pilots have *some* financial stake in pursuing this litigation.

In the negotiations leading up to the Letter Agreement, the active pilots, represented by ALPA, received as we know sizable compensation for surrendering their right to fight for their pension rights. The retired employees were bound to receive less. They lost less; a retired pilot will have enjoyed the benefit of full pension payments since his retirement, while an active pilot who is near retirement will have been contributing to the pension plan for many years without receiving any benefits. More important, the active pilots had a stick to use against United – the threat of a strike – that the retirees didn't have. But the retired pilots received not merely lower replacement benefits than the active pilots; they received nothing – and with no opportunity to have negotiated for something.

United defends this result primarily on the ground that two parties to a contract are always free to modify it without considering the views of any third parties. United and ALPA are the only parties to the collective bargaining agreement, and a union's duty to bargain collectively on behalf of the members of the bargaining unit that the union represents does not extend to retired workers, because they are not members of the unit. *Allied Chemical & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166, 182 n. 20, 92 S.Ct. 383, 30 L.Ed.2d 341 (1971). The retirees do not argue

that they are third-party beneficiaries of the collective bargaining agreement. The argument would be unlikely to prevail, which may be why it hasn't been made. The test for whether someone is a third-party beneficiary is whether the express parties to the contract intended the third party to have the right to enforce the contract. *A.E.I. Music Network, Inc. v. Business Computers, Inc.*, 290 F.3d 952, 955 (7th Cir.2002); *Vidimos, Inc. v. Laser Lab Ltd.*, 99 F.3d 217, 219-20 (7th Cir.1996). Generally, the test is deemed satisfied if a member of the bargaining unit seeks to enforce the collective bargaining agreement. E.g., *United Food & Commercial Workers Local 951 v. Mulder*, 31 F.3d 365, 370 (6th Cir.1994). It is satisfied if the beneficiary under a welfare plan established by a collective bargaining agreement sues for benefits. *Hazen v. Western Union Tel. Co.*, 518 F.2d 766, 767-70 (6th Cir.1975). But neither employer nor union would want to create a situation in which retirees, whose interests diverge from those of the active employees, would be able to block modification of the collective bargaining agreement.

ALPA adds, rather unhelpfully, that the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*, which governs labor relations in the airline industry as well as the railroad industry, does not permit an employer to engage in collective bargaining with any entity other than the union that represents its employees. 45 U.S.C. §§ 152 Fourth, Seventh. That rule would not prevent the employer from negotiating with retirees, who are no longer members of the bargaining unit, if the retirees could derail or impede the negotiations between the parties to modify the collective bargaining agreement. An agreement to modify or abrogate a collective bargaining agreement doesn't affect tax-qualified pension rights created by the agreement

until those rights are terminated by a separate order under ERISA. United needed that order for its negotiations with ALPA to give it what it ultimately wanted, namely the termination of the pension plans.

The plans have been terminated, as we said, subject to appeal. The retired pilots are not complaining about the termination in this appeal but about being cut out of an opportunity to obtain replacement benefits, as the active pilots were able to do by virtue of their representation by ALPA, in the negotiations that resulted in the Letter Agreement that the judge approved under 11 U.S.C. § 363(b)(1). The question presented by the retired pilots' appeal boils down to whether the bankruptcy judge could approve that agreement without giving any consideration to the retired pilots' interests.

What interests? More precisely, what *legally protected* interests? United points out that only "interested parties" may participate in a hearing on the debtor's proposal to reject a collective bargaining agreement, 11 U.S.C. § 1113(d)(1), and we have held that "interested parties" include only the parties to (or a guarantor of) the agreement. *In re UAL Corp. (IFS),* 408 F.3d 847, 851 (7th Cir.2005). It is true that *In re Century Brass Products, Inc.,* 795 F.2d 265, 274-76 (2d Cir.1986), had held that retirees are "employees" within the meaning of section 1113(b), and so are entitled to be consulted about the proposal that the employer is required to make as a preliminary to moving the bankruptcy judge to reject the collective bargaining agreement. But *Century Brass* had not discussed whether the retirees were interested parties under section 1113(d), entitling them to oppose the rejection of the agreement, which was the subsection in question in *IFS.* At most, *Century Brass* injects some

uncertainty concerning the retired pilots' rights in a section 1113 proceeding, and we shall see that despite the abandonment of that proceeding by United this uncertainty could have a bearing on our decision. For the moment, however, the only relevant point is that United's argument puts the cart before the horse. There was no section 1113 hearing.

United notes that section 1114, which governs give-ups of medical benefits, expressly requires the appointment of a representative for the beneficiaries in negotiations for such give-ups (corresponding to the pre-rejection negotiations under section 1113). This implies, United argues, that no representative need be appointed for section 1113 negotiations. The argument is unpersuasive. In enacting section 1114, Congress was reacting to a particular issue, that of termination of medical benefits, in a particular bankruptcy, that of the LTV corporation. Susan J. Stabile, "Protecting Retiree Medical Benefits in Bankruptcy: The Scope of Section 1114 of the Bankruptcy Code," 14 *Cardozo L.Rev.* 1911, 1926-27 (1993). There is no indication that Congress was specifying or disallowing procedures to be used in section 1113 proceedings. In any event, the question presented by this appeal is not the procedures required by section 1113, since no order was ever issued under that section. It is what negotiating rights if any the retired pilots should have had with regard to the agreement that the bankruptcy judge approved under section 363(b)(1), an agreement that confirmed the receipt of replacement benefits by the active pilots and the receipt of nothing by the retired ones.

Normally, as we said, the parties to a contract can modify it freely without regard to the impact on the financial interests of third parties who are not third-party

beneficiaries. But the setting here is abnormal. The modification of the collective bargaining agreement had to be approved by the bankruptcy judge under section 363(b)(1) because it involved payment from the debtor's estate (the replacement benefits) other than in the ordinary course of the debtor's business. *In re Kmart Corp.*, 359 F.3d 866, 872 (7th Cir.2004). The reason for the requirement of obtaining judicial approval in such a case is that contracts made by a debtor in bankruptcy that are not in the ordinary course may have an impact on the other creditors in the bankruptcy proceeding. *United States v. Goodstein*, 883 F.2d 1362, 1367 (7th Cir.1989); *In re Abbotts Dairies of Pennsylvania, Inc.*, 788 F.2d 143, 150 (3d Cir.1986); *In re Continental Air Lines, Inc.*, 780 F.2d 1223, 1227-28 (5th Cir.1986). The criteria for approval, therefore, are whether the transaction makes good business sense, in which event the creditors as a whole should benefit, *In re Schipper*, 933 F.2d 513, 515 (7th Cir.1991), and whether it preserves the priorities among the creditors. *In re Kmart Corp., supra*, 359 F.3d at 872-73.

United argues that allowing the retired pilots into the negotiations that resulted in the Letter Agreement that the bankruptcy judge approved could not have increased the value of the estate because the retired pilots have no right to enforce the collective bargaining agreement. Which is true, but does not carry quite as far as United thinks. Remember that the Letter Agreement provided that ALPA would not oppose United's effort to terminate the pension plans. Well, the retired pilots could oppose too, though probably not in a section 1113 proceeding (that is the uncertainty we mentioned earlier). The pension plans could be terminated only by proceedings under 29 U.S.C. §§ 1341 or 1342, and the retired pilots both participated in

and argued against the PBGC's application for involuntary termination of the pension plans under 29 U.S.C. § 1342. They lost – maybe; the case is on appeal. Surrendering the right to oppose, which doubtless they, like the active pilots, would have done in exchange for replacement benefits (better the bird in the hand), might have been worth something to the debtor's estate, for example if it had headed off the appeal from termination now pending in the district court, with the possibility of a further appeal to this court (and beyond).

Had United thought the retired pilots worth buying off, it would have offered them something for a "no fight" clause similar to the one in the Letter Agreement. The fact that United did not do this is evidence that the retired pilots had nothing to "sell." But it is not conclusive evidence. Section 363(b)(1)'s requirement that the debtor obtain judicial approval of agreements that are outside the ordinary course of business signifies a degree of congressional distrust of the contractual process in bankruptcy. *In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir.1983). The fear is that the debtor who steps out of the ordinary course of business may be harming creditors as a whole or favoring one creditor over the others without a valid ground. But the criteria for approval – whether the transaction makes good business sense and does not disturb the creditors' rights *inter se* – do not argue compellingly for requiring the debtor to negotiate with creditors seeking special consideration just because they may be in a position to throw a monkey wrench into a transaction otherwise highly advantageous to the debtor and the creditors as a whole.

The fact that United is warning us that the retired pilots are threatening to derail the reorganization and

plunge United back into bankruptcy is hardly evidence that getting the retired pilots "on board" the Letter Agreement might indeed have been in the best interests of the estate; it is forensic advocacy; it is the argument we would expect to be made any time someone claimed compensation for not having tried to derail the bankruptcy proceeding. But what is true is that the already daunting complexity of major corporate bankruptcies would be multiplied if anyone with some potential blocking power, yet whom the trustee or debtor in possession had not thought it worthwhile trying to pay to buy peace with, could insist on negotiating rights as a condition of the bankruptcy judge's approving a transaction out of the ordinary course.

Even if, despite what we have just said, the bankruptcy judge should have conditioned approval of the section 363(b)(1) agreement on the retired pilots' being made negotiating partners with United and the union, there is no longer any feasible remedy that a court could order. To avoid the unraveling of the section 1342 proceeding and perhaps of the entire bankruptcy (though that seems unlikely), we would not order the Letter Agreement vacated. That would be a "logical" remedy but unnecessarily disruptive. All we could do would be to direct the bankruptcy judge on remand to determine what he would have insisted that the retired pilots receive in the agreement, as a condition of his approving it, had he realized they had the same kind of interest as the active pilots, namely the interest conferred by a right to mount an opposition to the termination of the pension plans. But there would be no objective basis for calculating the value that such a right would command in a hypothetical negotiation.

We conclude that the denial of relief to the retired pilots should be, and it is,

Affirmed.

2005 WL 1528259 (N.D.Ill.)

United States District Court,
N.D. Illinois, Eastern Division.
In re: UAL CORPORATION, et al., Debtors.
UNITED RETIRED PILOTS BENEFIT PROTECTION ASSOCIATION, Roger D. Hall, Dennis D. Dillon, Gerard Terstiege, Eugene M. Cummings, Raymond P. Fink, James M. Krasno, and William L. Rutherford, Appellants,
v.
UNITED AIR LINES, INC., et al., Appellee.
No. 05 C 1202.

June 22, 2005.

Eric E. Newman, Jack J. Carriglio, James Gregory Argionis, Meckler, Bulger & Tilson, Chicago, IL, Frank Cummings, Lebeoeuf, Lamb, Greene & Macrae, LLP, Washington, DC, for Appellants.

Marc Jason Carmel, David Richard Seligman, Erik William Chalut, James H.M. Sprayregen, Marc Kieselstein, Kirkland & Ellis LLP, Eugene Robert Wedoff, Kenneth S. Gardner, Chicago, IL, for Appellee.

MEMORANDUM OPINION AND ORDER

DARRAH, J.

Appellee, United Air Lines, Inc. ("United"), entered into an agreement with the Air Line Pilots Association (the "Pilots Association) to modify the Pilots Association's collective bargaining agreement. As part of the agreement, the Pilots Association agreed that United was not required to maintain a defined benefit pension plan and that, under certain circumstances, the Pilots Association would not oppose United's efforts to terminate the pension plan.

Thereafter, United and the Pilots Association sought bankruptcy court approval of the agreements. Appellants, the United Retired Pilots Benefit Protection Association, and certain individual retired pilots – Roger D. Hall, Dennis D. Dillon, Gerard Terstiege, Eugene M. Cummings, Raymond P. Fink, James M. Krasno, and William L. Rutherford – objected to the agreement. Presently before the Court is United's Motion to Dismiss Appeal of Appellants.

BACKGROUND

United sought to modify the collective bargaining agreement with the Pilots Association. While United attempted to obtain consensual modifications, it also filed a motion under 11 U.S.C. § 1113 to reject the collective bargaining agreement. The bankruptcy court ruled that Appellants could not appoint an authorized representative for the retired pilots to participate in the § 1113 proceedings. Appellants filed an appeal concerning this issue; that appeal was dismissed.

However, United did not reject the collective bargaining agreement under § 1113. Instead, United and the Pilots Association reached an agreement concerning the modification of the collective bargaining agreement. The agreement provided that:

> In the event [United] seeks judicial approval to terminate the United Airlines Pilot Defined Benefit Pension Plan (the "A Plan") under 29 U.S.C. § 1341(c) following April 11, 2005, then, on and after May 11, 2005, (i) the [Pilots] Association shall waive any claim it may have that the termination of the A Plan would violate the terms and conditions of the existing collective

> bargaining agreement between [United] and the [Pilots] Association, and (ii) the [Pilots] Association shall not otherwise oppose [United's] efforts to terminate the A Plan under 29 U.S.C. § 1341(c); provided, however, that nothing in this Letter of Agreement shall be construed, deemed, or characterized by [United] as any agreement of any form by the [Pilots] Association that the A Plan should be terminated. . . .

(Letter of Agreement ¶ 4(a)). The agreement further provided that:

> The A Plan shall remain in full force and effect unless (i) the bankruptcy court issues an order declaring that the Company has met the requirements for plan termination under 29 U.S.C. § 1341(c)(2)(B)(ii), and (ii) any of the following has occurred: (A) no timely notice of the appeal of the order has been filed, (B) the order has been affirmed following the exhaustion of all appeals; or (C) the Exit Date has occurred and the Plan of Reorganization has become effective without provision for the continuation of any such appeals. . . .

(Letter of Agreement ¶ 4(c)).

The order approving the agreement stated that "[p]ursuant to Section 363 of the Bankruptcy Code [11 U.S.C. § 363], the Revised [Pilots Association] Restructuring Agreement is approved, and the Debtors are hereby authorized to enter into and perform under the [Pilots Association Collective Bargaining Agreement] as modified by the Revised [Pilots Association] Restructuring Agreement." The order further provided that "[u]pon the occurrence of all the conditions to effectiveness in the Revised [Pilots Association] Restructuring Agreement, [United]

shall be deemed to have withdrawn, as to [the Pilots Association], their pending motion to reject their collective bargaining agreements pursuant to Section 1113(c) without prejudice."

Appellants objected to this agreement, contending that they were wrongfully excluded from the § 1113 process which could lead to the termination of the contractually vested rights of the retired pilots. On May 11, 2005, over Appellants' objection, the bankruptcy court entered an order approving an agreement between United and the Pension Benefit Guaranty Corporation (the "PBGC"), which allows the PBGC to terminate the Pilots Association pension plan under 29 U.S.C. § 1342.

ANALYSIS

United seeks to dismiss Appellants' bankruptcy appeal of the order approving the agreement between United and the Pilots Association. According to United, that order is not appealable because: (1) it is not a final order, (2) no exceptional circumstances exist to grant Appellants leave to appeal an interlocutory order, and (3) the collateral order doctrine is not applicable.

Section 158 of Title 28 provides that "[t]he district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees." 28 U.S.C. § 158(a)(1). In bankruptcy proceedings, the reviewing court looks at the finality of an order with a "relaxed eye" and interprets the finality requirement more liberally under § 158 than under 28 U.S.C. § 1291. *See In re Forty-Eight Insulations, Inc.*, 115 F.3d 1294, 1298 (7th Cir.1997). Even without a formal termination of the case, a bankruptcy court's order is final and appealable if it (1) resolves

all contested issues on the merits and leaves only the distribution of the estate assets to be completed; (2) ultimately determines a creditor's position in the bankruptcy proceeding, even though the administration of the debtor's estate continues; or (3) marks the conclusion of what, but for the bankruptcy, would be the equivalent of a stand-alone suit by or against the trustee.

BA Leasing Parties v. UAL Corp., 2003 WL 22176068, at *4 (N.D.Ill. Sept.15, 2003) ("*BA Leasing*") (internal citations and quotations omitted). Appellants argue that the order is a final order because: (1) it approved a settlement agreement; (2) it is the last order concerning a § 1113 proceeding; and (3) the order was, for all practical purposes, the equivalent of an order denying intervention and, therefore, is appealable.

Appellants contend that orders approving settlement agreements are final orders and cites *In re McCoy*, 260 B.R. 863, 867 (Bankr.N.D.Ill.2001). However, that case further states that "an order approving a settlement is final because it determines the rights of the parties to the settlement." *In re McCoy*, 260 B.R. at 867 (citations omitted). The court further stated that "[a]fter entry of the Order, there was no issue left for future adjudication by the Court, and therefore the Order was indeed final." In contrast, the order approving the settlement in this case leaves open other issues for future adjudication by the bankruptcy court; specifically, whether the pilots' pension plan can be terminated under 29 U.S.C. § 1341.

Appellants also contend that the order was final because it is the last order concerning the 11 U.S.C. § 1113 proceeding and thus resolved a discrete issue: whether the bankruptcy court had authority to take away the retired

pilots' contract rights even though they could not participate in that proceeding. This order, though, was not entered pursuant to § 1113 but, rather, was the result of an agreement entered between United and the Pilots Association. Therefore, even if § 1113 permitted Appellants to be represented during the proceedings – which the statute probably does not permit, *see In re UAL Corp.*, No. 05-2061, 05-2093, ___ F.3d ___, 408 F.3d 847, 2005 WL 1243335, at *3 (7th Cir. May 24, 2005) – that section is inapplicable to the present action.

Appellants next argue the order was final because it was equivalent to a denial of a motion to intervene in the § 1113 proceedings. However, "[n]o appellate opinion holds that a bankruptcy judge's decision whether a given participant in the proceedings is an 'interested party' under § 1113 is equivalent to the denial of intervention. . . ." *In re UAL Corp.*, 408 F.3d 847, 2005 WL 1243335, at *1.

Under 11 U.S.C. § 158(a)(3), district courts may, at their own discretion, grant parties leave to appeal non-final orders under exceptional circumstances. Courts in the Seventh Circuit apply the standards set forth in 28 U.S.C. § 1292(b) in determining whether to exercise their discretion under § 158(a)(3). *BA Leasing,* 2003 WL 22176068, at *5. Section 1292(b) provides for appellate review of interlocutory orders when "the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that immediate appeal from the order may materially advance the ultimate termination of the litigation." "Generally speaking, leave to appeal an interlocutory order will not be granted absent exceptional circumstances." *BA Leasing,* 2003 WL 22176068, at *5 (internal quotations omitted).

Appellants argue that there is a controlling question of law as to which there is substantial ground for a difference of opinion concerning the interpretation of 11 U.S.C. § 1113. However, as discussed above, the order was not entered pursuant to § 1113; and Appellants, therefore, have no rights under that section. Furthermore, even if the order was entered pursuant to § 1113, there is no difference of opinion as to Appellants' rights under that statute. An interested party for purposes of Section 1113 is a "'party to that collective bargaining agreement' or a guarantor of that contract." *In re UAL Corp.*, 408 F.3d 847, 2005 WL 1243335, at *3. Because of this interpretation,

> Labor and management are free to change their agreements without any complaint by individual workers or pensioners – or for that matter by other third-party beneficiaries, including pension fiduciaries. What labor and management may do voluntarily, the court may accomplish in a § 1113 proceeding. There is no reason to include in the § 1113 proceeding any person or entity whose consent would be unnecessary to a voluntary change in the agreement.

In re UAL Corp., 408 F.3d 847, 2005 WL 1243335, at *3. Accordingly, no exceptional circumstances exist which warrant an interlocutory appeal.

Appellants next argue that the bankruptcy court's order is also appealable under the "collateral order" doctrine. Under that doctrine, an order is reviewable if "it is important, not subject to reconsideration in the trial court, distinct from the merits, and unreviewable as a practical matter later." *In re UAL Corp.*, 408 F.3d 847, 2005 WL 1243335, at *2. If this appeal only implicated the propriety of allowing Appellants to participate in a § 1113

proceeding, then the collateral order doctrine would provide jurisdiction over the appeal. *In re UAL Corp.*, 408 F.3d 847, 2005 WL 1243335, at *2-3. Again, as discussed above, this appeal does not arise from an order modifying a collective bargaining agreement under § 1113; instead, United and the Pilots Association collectively bargained to reach their agreement. Furthermore, even if the issues arise under § 1113, Appellants and other retirees are still receiving their pension benefits and will continue to do so until United seeks to terminate the benefits under 29 U.S.C. § 1341. The Appellants would be entitled to participate in that proceeding and seek review of that decision and, therefore, be able to obtain consideration of the key issue – whether the retirees are entitled to pension benefits. Accordingly, the collateral order doctrine is inapplicable.

CONCLUSION

For the foregoing reasons, United's Motion to Dismiss Appeal of Appellants is granted.

12/14/2004 United Hearing Transcript

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

United Airlines, Inc., et al,	)	No. 02 B 48191
	)	Chicago, Illinois
	)	
	)	9:30 a.m.
Debtor.	)	December 14, 2004

TRANSCRIPT OF PROCEEDINGS BEFORE THE
HONORABLE EUGENE R. WEDOFF

APPEARANCES:

For Debtors:	Mr. David Seligman; Mr. Chris Heck;
For URPBPA:	Mr. Jack Corrigilio [sic];
For IAM:	Mr. Tom Redburn;
For Assoc. Flight Attendants:	Mr. Robert Clayman;
For Airline Pilots Assoc.:	Ms. Babette Ceccolti [sic];
Court Reporter:	JACKLEEN DE FINI, CSR, RPR U.S. Courthouse 219 South Dearborn Room 661 Chicago, Il. 60604.

[2] THE CLERK: UAL Corporation, 02 B 48191.

MR. CARRIGILIO: Good morning, Your Honor. Jack Carrigilio for the United Retired Pilots Benefit –

THE COURT: You need to speak directly into a microphone, Mr. Carrigilio, to be heard on the telephone.

Then as long as you've started, let's have the other appearances by counsel in the courtroom.

MS. CECCOLTI [sic]: Good morning, Your Honor. Babette Ceccolti [sic] for the Airline Pilots Association.

THE COURT: Miss Ceccolti [sic], perhaps you are not able to hear me. What I was asking for first, because Mr. Carrigilio started, I asked for appearances in the courtroom first.

MS. CECCOLTI [sic]: I'm sorry, Your Honor. I couldn't hear you.

THE COURT: That's what I was afraid of. If you have problems hearing what's going in the court, please let us know.

MS. CECCOLTI [sic]: All right.

THE COURT: Mr. Seligman, go ahead.

[3] MR. SELIGMAN: David Seligman on behalf of the debtors.

MR. HECK: Chris Heck on behalf of the debtors.

THE COURT: And the appearances by telephone, please.

MR. REDBURN: Tom Redburn for the International Association of Machinists. Good morning, Your Honor.

THE COURT: Good morning.

MR. CLAYMAN: Robert Clayman, Your Honor, for the Association of Flight Attendants.

THE COURT: Are there any other appearances by telephone?

Okay. Two matters before the court this morning, the first is a motion – and both brought by the United Retired Pilots Benefit Protection Association, the first is a motion to be appointed as section 1113 authorized representatives. If I'm not mistaken, there's no such thing. Section 1114 calls for the appointment of an authorized representative for retirees who are not being represented by their union in connection with the change in retiree medical benefits. But there's no parallel provision in section 1113.

[4] Is that right?

MR. CARRIGILIO: Not in 1113 itself, Your Honor. We are relying on the rational of the Century Brass case and similar cases where they've encountered this type of rather unusual situation where, as we have here, all of the unions except ALPA are representing their retirees. ALPA is not representing their retirees.

THE COURT: Okay. I think the situation is really simple: To the extent that you have authorization from the parties in interest, that is the Retired Pilots that you represent to participate in the proceeding, go ahead and participate in the proceeding. But there is no point in my giving you some kind of official status that's not called for by the code. The question that I think underlies your motion is a desire to participate, and I don't take it that there's any objection from parties about your participating to some extent.

As with any party that is participating in the proceedings, I would hope that we not have duplication of questioning and unnecessary delay. But if you are representing parties who have an interest in the proceeding and [5] because of the potential for a de facto issue preclusion, I think I have already made a determination that parties whose ultimate interest is in the distressed termination proceeding that's anticipated would have a right to participate in this collective bargaining matter. But that would be the basis for your participation, not any kind of official appointment by the court.

MR. CARRIGILIO: The only thing I would say on that, Your Honor, is the extent of the participation is really the issue. There's no one in the mix right now who's in a position to bargain with the debtor on the good faith proposals that are supposed to be going back and forth as to the retired pilots' rights.

THE COURT: There's no requirement now for the debtor to be negotiating with the retired pilots. The matter in dispute right now is a collective bargaining agreement. The parties to the collective agreement are the debtor and the union. So as far as negotiations are concerned, those are the only two parties that are appropriate. When the question comes up as to whether there is a necessity for terminating pension plans, that may be one of the issues that's involved in 1113 process, you would [6] have a right to represent the interests of your members insofar as those interests are affected by that determination. But you don't have a right to participate in negotiations regarding a collective bargaining agreement to which your members are not a party.

MR. CARRIGILIO: Our only position on that, Your Honor, was the same position in Century Brass. Since we don't have the proposals, we don't really know whether – just like in Century Brass, ALPA is saying that because they don't represent retirees, they will not bargain away retiree rights. Or perhaps ALPA is doing just that, that in order to get better wage concessions for their active members they're agreeing to a termination or modification of the retiree pension plan.

THE COURT: Or [sic] course they're perfectly free to do that. If they were negotiating a new collective bargaining agreement, this one terminated, your members would have no right to participate in those negotiations.

MR. CARRIGILIO: Well, Your Honor, for the vested rights we believe that we do. If they negotiated –

THE COURT: Excuse me. On that point [7] you and I simply have a difference of opinion. I believe that the parties to the contract, that is to say the unions on one hand and United on the other, are the ones who are appropriately engaged in negotiations at this point. And were it not for the fact that there is a distressed termination proceeding in prospect as to which there might be some impact on account of determinations that I would make in the 1113 process, you would have no standing to participate in the 1113 process at all. But because there is this potential overlap of issues, I have indicated that I thought it was appropriate to expand the concept of standing for the purpose of adjudicating contested issues regarding the necessity of terminating pension plans.

MR. CARRIGILIO: I understand.

THE COURT: So you're certainly entitled under that ruling that I have already made to participate in a contested hearing on the question of whether it's necessary to terminate the pension plans. That doesn't give you a right to participate in negotiation over a collective bargaining agreement to which you are not a party.

MR. CARRIGILIO: The only additional point, Your Honor, we raised it in the memo, and I [8] also confirmed it yesterday with PBGC's counsel, is that there's a qualified and a nonqualified component to the retired pilots' pension plan. And as we raised in our brief, and as was confirmed to me yesterday by the PBGC's counsel, they do not – the PBGC does not believe that it will be in a position, or should be in a position to defend the nonqualified portion of the pilots plan at a distressed termination hearing. They do not believe that would be appropriate.

THE COURT: Fine.

MR. CARRIGILIO: So it could effectively then be bargained away within the context of this 1113 by a representative, by a union that does not represent its retirees. That's an additional reason why we believe that it would be appropriate to have someone in the mix now to negotiate, especially as to that nonqualified component of the plan.

THE COURT: Again on this subject, we simply have a disagreement. You believe that your clients have a right to negotiate a collective bargaining agreement with the debtors and I disagree because they're not parties to the collective bargaining agreement. So on that one we'll simply [9] have to register that disagreement. And on that basis I'm going to deny the motion for official appointment without prejudice to your participating in the hearing to

determine whether it is necessary to terminate these pension plans under the collective bargaining agreement.

And, again, the reason why that participation is allowed is solely because it might have an impact on the later determination that the court would be required to make in a distress termination proceeding where your clients would unquestionably have standing to participate.

Now that brings us to the second motion, which is the discovery motion. As I understand it from the debtors' reply, there were four items of information that you were seeking in discovery. The first two of which have already been resolved.

MR. CARRIGILIO: Well, they've been resolved, but we haven't received them.

THE COURT: But there's an agreement by the debtors to provide them.

How long will that take to provide?

MR. HECK: Your Honor, I think for providing the business plan, we can do that as soon [10] as we have a confidentiality agreement in place.

As far as the actuarial information, that's too vague of a term to figure out what the retired pilots want. We have asked than to be more specific in the information they're looking for. Once they do that, the confidentiality agreement in place, we'll be turning over those two categories of documents.

THE COURT: Well, do you have any reason to believe that that can't be done by Friday?

MR. HECK: No, Your Honor. I think we should be able to do that by Friday.

THE COURT: That's what I would have expected.

MR. HECK: Depending on once they specify the actual actuarial information, the volume of what they're looking for.

MR. CARRIGILIO: May I speak to that? I talked with Mr. Hagan from their office, Your Honor. On that one I have been waiting for the name of their actuary, because just like what we went through on the 1114 process when we were exchanging actuarial information, we had our actuary contact their actuary and say what we needed, items that I think they have termed would be "on the shelf," that [11] have been provided to other parties within the 1113 process.

THE COURT: What I'm going to do is simply continue these matters to the Friday omnibus with the expectation that they'll be resolved.

Now, on the third and fourth items, the third item being settlement discussion information between the debtor and one of the unions.

MR. CARRIGILIO: May I speak to that, Judge, for a moment?

THE COURT: I'm just going to tell you, you're not entitled to it. It basically flows from the same discussion we had earlier. If your members were properly parties to the negotiation of a collective bargaining agreement, they might well be entitled to the kind of information that you are seeking, but they're not. The parties to this process of

negotiation under section 1113 are the unions on one hand and United on the other. And your members are not parties to that negotiation. Since they're not parties to the negotiation, they're not entitled to what are confidential settlement discussions between the parties. And I don't see any way around that.

The issue again that you have standing [12] to pursue at the contested hearing has to do with the necessity of terminating the pension plan. And on that question you are entitled to reasonable discovery. And I think that's acknowledged by the debtors in their agreement to provide you with the first two categories of information that you were seeking. But as to settlement negotiations, you would not be entitled.

MR. CARRIGILIO: The only item there, Your Honor, is as part of the 1113 we should have a say in whatever 1113 result there is is fair and equitable as to all affected parties. And where we are going with this request for the proposals between ALPA and United, Your Honor, is to make a determination as to whether they are fair and equitable as to the retired pilots. For instance, if ALPA in order to get a better wage concession out of United is bargaining away retiree benefits to our detriment, we believe we should know about that and be able to point that out to Your Honor, that they made X dollars in wage benefits for themselves by bargaining away benefits of the retirees.

THE COURT: My obligation under 1113 is to have a hearing on termination of a collective bargaining agreement in the event that the parties to [13] the collective bargaining agreement are not able to reach agreement. I don't know anything in 1113 that requires me to

allow other parties who are affected by an agreement to object to the agreement. If that's a requirement, I don't see it in 1113.

Again, if there's a contested hearing, you're perfectly permitted to participate. And the issue in the collective hearing may very well be the need to terminate the pension plan. But if there's an agreement reached, we're not talking about an 1113 hearing. At most, we'd be talking about some kind 363 hearing, in which case another notice would go out and you'd have an opportunity to be heard on that matter. But it would not be an 1113 process. And if I am mistaken about that, I will certainly look for someone to correct me. But that's my understanding of the way 1113 works. I have hearings in the absence of agreement, not hearings in the presence of agreement.

So, again, the agreement process, the negotiation process is one that is to be conducted between the debtor and the unions that are parties to the collective bargaining agreement, not third parties who might be affected by those discussions. So as to that aspect the motion is denied.

[14] Now the final aspect has to do with this Bridge report.

MR. CARRIGILIO: Yes, sir.

THE COURT: That is a difficult issue. The parties who created the Bridge report did so with an understanding between themselves that the Bridge report would be held confidential. But if the Bridge report contains information that's discoverable, how does a private agreement among the parties who generated the Bridge report prevent discovery?

MR. HECK: Well, Your Honor, I think the first point on that is that Your Honor entered an order approving all the terms of the Bridge report, and that motion to approve was noticed up. The confidentiality provisions were in that motion. If someone had wanted to object to them at the time, they could have done so before this court entered that order.

THE COURT: Well, did I enter an order that said that the provisions of this report are going to be immune from discovery?

MR. HECK: No, Your Honor. You entered an order approving –

THE COURT: Approving the agreement between the parties.

[15] MR. HECK: Yes, Your Honor.

THE COURT: The parties were going to agree to hold the contents confidential. Parties enter into confidentiality agreements all the time that are overridden by discovery in lawsuits.

MR. HECK: Correct, Your Honor.

To clarify, you approved – in terms of the engagement letter with Bridge, which included the confidentiality provision within it.

THE COURT: So, again, my question stands: What we have is an agreement among the parties who sought the Bridge report that it be held confidential. That agreement certainly bound the parties. So neither the unions nor the debtor could voluntarily disclose that report. But if the report is sought in discovery, and if the

report's relevant in discovery, then I would suppose that it ought to be discoverable. It may very well be that a confidentiality obligation could be imposed on the party that's seeking the discovery. But I'm not aware of any rule of law that would allow a private agreement between parties, even if it's approved by a court, to preclude discovery of relevant information.

TELEPHONICALLY: Your Honor –

MR. CARRIGILIO: – confidentiality [16] agreement, Your Honor, I do want to make that point.

THE COURT: Mr. Clayman.

MR. CLAYMAN: This is Robert Clayman.

THE COURT: Yes.

MR. CLAYMAN: We join in the IM's position regarding this. The fact is is that part of the benefit of the bargaining between the parties was confidentiality, just as a matter – whether you call it public policy or not, the interests of the parties in reaching agreement that a court approving those agreements would seem to be that they actually are meaningful. And if there's an agreement of confidentiality that's simply going to be breached every time there's discovery, then there may not have been an agreement of this kind.

THE COURT: What I'm going to do is, since I'm continuing this motion, or at least portions of the motion until Friday anyway, and given that there's very little time for the parties opposing this particular request by the retired pilots to respond to it, I will continue the motion with respect to the Bridge report as well to Friday on the omnibus.

But what I would need if I'm going to deny this request for discovery is some authority for [17] the proposition that an expectation among parties that information will be kept confidential is sufficient to preclude discovery.

MR. REDBURN: Your Honor, Thomas Redburn from the IM. Can I just throw out one additional point for the court's consideration?

THE COURT: Certainly.

MR. REDBURN: And that is that it's not clear to me that this document is relevant to the 1113(c) process. This document was created after the debtor had already developed its business plan. And it's my understanding that it was not created for use in connection with the debtors' formulation of its proposals to the unions. So it's not clear to me that this is a document that the retired pilots need in connection with this proceeding.

I would also point out that the underlying source documents that were analyzed by the Bridge report, particularly the debtors' business plan, those are going to be made available to all the interested parties in the course of discovery. So it's not clear to me that the pilots have made any showing that this document is either relevant or that it is necessary for them to obtain in order to participate in the 1113(c) proceeding.

[18] THE COURT: Well, I think you have ignored the fairly broad standard for production of discovery, which is not only documents that are likely to be admissible as relevant in themselves, but also documents that are likely to lead to the discovery of relevant, admissible information.

Given that the hearing is anticipated to involve questions of the necessity of terminating pension plans in order for a successful reorganization to occur, a document that analyzes the condition of the debtor financially would certainly seem to me to bear on that question and hence be discoverable. It may be that it's produced after the plan that United is proposing right now, but that doesn't change the fact that it may bear on the necessity for termination of pension plans.

MR. REDBURN: Well, Your Honor, as the IM indicated in its limited objection, we are willing to agree to the circulation of an executive summary summarizing the core findings of the report, which I think is all that the retired pilots would need. But that would protect from disclosure the confidential aspects of this report which, you know, echoing Mr. Clayman's statements that the confidentiality which was a critical material term of the agreement [19] settling the trustee motion.

THE COURT: I will continue this to Friday. And if any party would like to file any additional memoranda in opposition to the motion, I can consider that to the extent that there's time to do it. But, again, what I understand the situation to be is one in which parties to the preparation – the commissioning, I should say, of a financial report agree among themselves that the report would be held confidential. And the question is whether if the report is relevant for purposes of discovery, that agreement among the parties can preclude disclosure. And, again, my understanding is that an agreement among parties that a document be held confidential does not immunize the document from disclosure. But if there is special circumstances, or if my understanding of the law in

this regard is incorrect, I will be happy to hear what you have to say about it.

MR. CLAYMAN: Thank you, Your Honor.

MR. REDBURN: Thank you, Your Honor.

THE COURT: So to summarize then, the requests in this motion insofar as it seeks disclosure of settlement discussion between the unions and United is denied. And other respects, the [20] motion is continued to Friday for a report on production pursuant to the first and second items of discovery, and for potential further argument with respect to the final one.

MR. CARRIGILIO: Very well, Judge. Thank you.

MR. SELIGMAN: Your Honor – Your Honor, I'm sorry. I just wanted to give the court also just one update, which doesn't bear directly to this, but we, the debtors, have reached a tentative agreement with a negotiating committee for the pilots. The terms haven't been disclosed yet, and there are a bunch of conditions that have to occur. Because we are here, I wanted to at least advise Your Honor of that. And I am sure we'll be talking more about that at Friday's omnibus hearing.

THE COURT: Thank you.

MR. CARRIGILIO: May I just get a clarification on that? Is the negotiating committee, is that ALPA?

MR. SELIGMAN: Of the pilots.

MR. CARRIGILIO: Thank you, Judge.

THE COURT: Just so it's clear, we had two motions today. I just outlined the disposition of the second

of those two. The first I think I [21] already made clear is denied for reasons I stated earlier.

MR. HECK: Yes, Your Honor. Thank you.

(Which were all the proceedings had in the above-entitled cause, December 14, 2004, 9:30 a.m.)

I, JACKLEEN DE FINI, CSR, RPR, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND ACCURATE TRANSCRIPT OF PROCEEDINGS HAD IN THE ABOVE-ENTITLED CAUSE.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Honorable Eugene R. Wedoff **Hearing Date** December 14, 2004

Bankruptcy Case No. 02 B 48191 **Adversary No.** _____

Title of Case UAL Corporation, et al.

Brief Statement of Motion Motion of The United Retired Pilots Benefit Protection Association to appoint section 1113 authorized representative in connection with debtor's motion for authority to reject their collective bargaining agreement **(Docket entry #9212)**

Names and Addresses of moving counsel _____

Representing _____

ORDER

It is hereby ordered that the above-stated motion is denied for the reasons stated in open court

/s/ Eugene R. Wedoff

THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

In re:	) Chapter 11
UAL CORPORATION, et al.,	) Case No. 02-B-48191
Debtors.	) (Jointly Administered)
	) Honorable Eugene R. Wedoff

ORDER APPROVING AGREEMENT MODIFYING THE DEBTORS' COLLECTIVE BARGAINING AGREEMENT WITH THE AIR LINE PILOTS ASSOCIATION

The Debtors in the above-captioned Chapter 11 cases have filed a Motion[1] seeking entry of an order authorizing and approving Debtors' entry into the Revised ALPA Restructuring Agreement attached as Exhibit A1 to the Motion. Upon reviewing such Motion, the Court finds that the relief requested as it applies to ALPA is in the best interests of the Debtors' estates, their creditors and other parties in interest; that this Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; that this proceeding is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2); that venue is proper in this District pursuant to 28 U.S.C. § 1408 and 1409; that all proper and adequate notice having been given as is practicable under the circumstances, and that no other notice need be given pursuant to Rules 1001, 2002(a) and 9006(c). After due deliberation and sufficient cause appearing therefore,

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[1] All capitalized terms not defined herein shall be as defined in the Motion.

IT IS HEREBY ORDERED THAT:

1. The Motion is granted.

2. To the extent required, all findings of fact shall be treated as conclusions of law and all conclusions of law shall be treated as findings of fact.

3. Pursuant to Section 363 of the Bankruptcy Code, the Revised ALPA Restructuring Agreement is approved, and the Debtors are hereby authorized to enter into and perform under the ALPA CBA as modified by the Revised ALPA Restructuring Agreement.

4. The Motion does not seek, and this Order does not constitute, an assumption of any agreement described herein, including without limitation, the Revised ALPA Restructuring Agreement and the ALPA CBA as modified by the Revised ALPA Restructuring Agreement. Therefore, except as otherwise specifically set forth in the Revised ALPA Restructuring Agreement, this Order or approval of the Revised ALPA Restructuring Agreement shall not, in and of themselves, create administrative expense or priority claims pursuant to Sections 507, 1113, 1114 or otherwise that would not otherwise (but for the execution or approval of the Revised ALPA Restructuring Agreement) be entitled to such levels of priority.

5. Notwithstanding anything to the contrary contained in the Revised ALPA Restructuring Agreement, approval of the Revised ALPA Restructuring Agreement shall constitute approval and allowance of the ALPA Administrative Claim and shall otherwise have the same meaning and effect as this Court's approval of the 2003 Pilot Agreement on April 30, 2003.

6. Upon the occurrence of all of the conditions to effectiveness in the Revised ALPA Restructuring Agreement, the Debtors shall be deemed to have withdrawn, as to ALPA, their pending motion to reject their collective bargaining agreements pursuant to Section 1113(c) without prejudice.

7. This Order approving the Revised ALPA Restructuring Agreement is without prejudice to any issues of fact or law that may come before the Court in connection with further Section 1113(c) proceedings or a motion for distress termination of Debtors' pension plans.

8. This Court retains jurisdiction with respect to all matters arising from or related to the implementation of this Order.

9. Any and all computations of or other matters related to time in connection with this Order shall be governed by Federal Rule of Bankruptcy Procedure 9006. Notwithstanding any provision contained in this Order or the possible applicability of Bankruptcy Rules 6004(g), 7062, 9014, or otherwise, (a) the terms and conditions of this Order shall be immediately effective and enforceable upon its entry, (b) all of the provisions of this Order shall be self-executing, and (c) the automatic stay of orders authorizing the sale, use, or lease of property of the estate, to the extent applicable, shall not apply to the Order.

Dated: JAN 31, 2005

/s/ Eugene R. Wedoff
United States
Bankruptcy Judge

11 U.S.C.A. § 1113. Rejection of collective bargaining agreements

(a) The debtor in possession, or the trustee if one has been appointed under the provisions of this chapter, other than a trustee in a case covered by subchapter IV of this chapter and by title I of the Railway Labor Act, may assume or reject a collective bargaining agreement only in accordance with the provisions of this section.

(b)(1) Subsequent to filing a petition and prior to filing an application seeking rejection of a collective bargaining agreement, the debtor in possession or trustee (hereinafter in this section "trustee" shall include a debtor in possession), shall –

> **(A)** make a proposal to the authorized representative of the employees covered by such agreement, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and
>
> **(B)** provide, subject to subsection (d)(3), the representative of the employees with such relevant information as is necessary to evaluate the proposal.

(2) During the period beginning on the date of the making of a proposal provided for in paragraph (1) and ending on the date of the hearing provided for in subsection (d)(1), the trustee shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such agreement.

(c) The court shall approve an application for rejection of a collective bargaining agreement only if the court finds that –

(1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (b)(1);

(2) the authorized representative of the employees has refused to accept such proposal without good cause; and

(3) the balance of the equities clearly favors rejection of such agreement.

(d)(1) Upon the filing of an application for rejection the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and representative agree.

(2) The court shall rule on such application for rejection within thirty days after the date of the commencement of the hearing. In the interests of justice, the court may extend such time for ruling for such additional period as the trustee and the employees' representative may agree to. If the court does not rule on such application within thirty days after the date of the commencement of the hearing, or within such additional time as the trustee and the employees' representative may agree to, the trustee may terminate or alter any provisions of the collective

bargaining agreement pending the ruling of the court on such application.

(3) The court may enter such protective orders, consistent with the need of the authorized representative of the employee to evaluate the trustee's proposal and the application for rejection, as may be necessary to prevent disclosure of information provided to such representative where such disclosure could compromise the position of the debtor with respect to its competitors in the industry in which it is engaged.

(e) If during a period when the collective bargaining agreement continues in effect, and if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to implement interim changes in the terms, conditions, wages, benefits, or work rules provided by a collective bargaining agreement. Any hearing under this paragraph shall be scheduled in accordance with the needs of the trustee. The implementation of such interim changes shall not render the application for rejection moot.

(f) No provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section.